IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 69935

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

No. 70227

MOTION TO STRIKE RESPONDENT'S NEW APPENDIX, OR PORTIONS THEREOF, AND TO STRIKE PORTIONS OF RESPONDENT'S COMBINED BRIEF REFERRING TO THE STRICKEN PORTIONS

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Appellant hereby moves to strike respondent's new appendix filed on May 26, 2017, on the ground that the new appendix is a fugitive filing, for which respondent did not have permission from the court. Alternatively, appellant moves to strike certain documents in the new appendix (and references to those documents in respondent's replacement brief filed on May 26, 2017), on the ground that the documents were already stricken from respondent's original appendix filed on February 1, 2017.

Procedural Background

On February 1, 2017, respondent filed a motion for permission to exceed the word-count limit for his combined answering brief on appeal and opening brief on cross-appeal. At the same time, respondent filed a 17-volume appendix, with 43 tabs and 4,072 pages of documents.

On February 2, 2017, appellant moved to strike portions of respondent's appendix and portions of the combined respondent's brief, on the ground that respondent's appendix contained documents that were not appropriate for an appeal appendix. Respondent opposed the motion to strike, arguing that each of the questioned documents was proper for the appendix.

On May 10, 2017, this court issued an order denying respondent's motion to exceed the word-count limit. The court ordered respondent to file a replacement brief within 15 days. The court also granted the entirety of appellant's motion to

strike. The court ordered the clerk to strike 14 tabbed documents from respondent's appendix.

The court's order denied as moot appellant's motion to strike references in respondent's combined brief. The court stated: "We trust respondent/cross-appellant will make appropriate references in the replacement brief." (Order, page 3, fn.2). Respondent did not move for reconsideration of the court's order striking the 14 documents. The clerk presumably struck the 14 offending documents from respondent's appendix, leaving the remaining portions of respondent's appendix (i.e., 30 additional documents) on file in the court's docket.

On May 26, 2017, respondent filed his replacement brief. Without seeking permission, respondent also filed a second appendix containing 34 tabbed documents (approximately 2,100 pages). Amazingly, respondent included three documents (Tabs 1, 2 and 8, with approximately 400 pages) that were ordered stricken in the court's May 10, 2017 order. The appendix also contains at least two new documents that were not in respondent's previous appendix.[1] (Tabs 5 and 9).

The court should strike respondent's entire new appendix

This court's order of May 10, 2017 was crystal clear. It denied respondent's motion to enlarge the word count for his brief, and it granted the entirety of

[1] The documents in respondent's new appendix are not in chronological order. Moreover, the so-called "Chronological Index" to respondent's new appendix is not chronological at all. It appears to be completely random.

appellant's motion to strike 14 documents from respondent's appendix. The remaining portions of respondent's first appendix were left intact, and the court ordered the clerk to strike the offending 14 documents from the appendix. The court did ***not*** grant respondent permission to file an entirely new appendix.

Now, without seeking permission from the court, respondent has filed an entirely new appendix. The new appendix contains different volume and page numbers for the documents that were not stricken from respondent's first appendix, thereby creating additional work for appellant's attorneys in evaluating respondent's appendix.

Appellant respectfully contends that respondent's new appendix should be considered a fugitive filing, for which respondent should have first requested permission from the court. See NRAP 27 (dealing with motions); e.g. *Scrimer v. District Court,* 116 Nev. 507, 511, fn.1, 998 P.2d 1190, 1192, fn.1 (2000) (granting motion for permission to file untimely answer to writ petition); *Ronning v. State,* 116 Nev. 32, 33, fn.2, 992 P.2d 260, 261, fn.2 (2000) (granting motion for permission to file supplemental argument).

Striking individual documents

Even if the court does not strike all of respondent's new appendix, the court should strike individual offending documents identified below. Appellant's first motion to strike provided legal authorities for the proposition that an appeal

appendix must consist only of copies of portions of the court-filed trial court record. Additionally, this court's order of May 10, 2017 relied upon NRAP 10(a) and (b), as well as *Carson Ready Mix v. First Nat'l Bank,* 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). These same legal authorities apply in the present motion.

This motion is also largely governed by the law-of-the-case doctrine. Under this doctrine, a court involved in later phases of a lawsuit is prohibited from reopening questions already decided by that court. *Recontrust Co. v. Zhang,* 130 Nev. Adv. Op. 1, 317 P.3d 814, 818 (2014). The doctrine ensures judicial consistency and prevents the reconsideration of decisions during the course of a lawsuit. *Hsu v. County of Clark,* 123 Nev. 625, 630, 173 P.3d 724, 728 (2007). The doctrine serves important policy considerations, including judicial consistency, finality, and protection of a court's integrity. *Id.*

Documents that should be stricken

If the court does not strike the entirety of respondent's new appendix, appellant requests the court to strike all of the documents identified below, and to strike any references to those documents in respondent's replacement brief.

(1) *1 R.App. 1-192 (Tab 1):* This is the deposition transcript of appellant Capanna. Respondent included the transcript in his first appendix, at 10 R.App. 2322 through 11 R.App. 2513 (Tab 11). Appellant's previous motion to strike argued that the transcript was not file-stamped, and it was not signed by the witness

or the court reporter. Respondent's opposition argued that his counsel published the deposition during trial, "which makes it part of the trial record." (Opp. pgs. 6-7).

This court granted the motion to strike, ordering the clerk to strike the transcript from respondent's appendix. (Order of May 10, 2017, page 3, item 6) The court obviously rejected respondent's argument that publishing the deposition during trial somehow made the transcript a part of the trial court record. Respondent did not seek reconsideration of this court's ruling, which is now the law of this case. Nevertheless, he flagrantly ignored the court's order striking the deposition transcript, and he has now included it in his new appendix, at Tab 1, located at 1 R.App. 1-192. His replacement brief also refers to the deposition transcript, making the identical argument that he made in his opposition to the motion to strike (and that this court rejected), namely, that publishing the deposition during trial "makes it part of the trial court record."[2] Respondent's Brief, page 3, fn.1.

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[2] Respondent's opposition to the previous motion to strike failed to cite any legal authority for the proposition that a deposition transcript automatically becomes part of the trial court record, and may therefore be used in an appellate appendix, merely because the deposition transcript is opened and published at trial, or because the attorneys referred to the transcript. Nor does respondent's replacement brief cite any such legal authority. There are ways in which portions of a deposition can be read at trial, such as to refresh the memory of a witness, to impeach a witness, or if a witness is unavailable for trial. In these instances, the portions read into the record in open court become part of the trial transcript. But the entire deposition transcript does not become part of the trial court record in these situations.

(2) *1 R.App. 193 through 2 R.App. 281 (Tab 2):* This document purports to be a deposition transcript of plaintiff Orth. It is identical to the deposition transcript that respondent included in his first appendix, at Tab 14, located at 11 R.App. 2556-2644.

Appellant's previous motion to strike requested the court to strike this transcript, because it was not signed by the witness, and not file-stamped. In his opposition to appellant's previous motion to strike, respondent argued that deposition transcripts in his appendix "were published during the trial, which makes them part of the record on appeal." (Opp. 2). Respondent's opposition further argued that defense counsel referenced this deposition at trial, and therefore respondent "properly includes this transcript in his appendix because it is part of the trial court record." (Opp. pg. 7)

Despite respondent's argument, this court granted the motion to strike, and the court ordered the transcript stricken from respondent's appendix. (Order of May 10, 2017, pg. 3, item 7) Although the court did not state precisely why the court struck the transcript, the court obviously rejected respondent's argument that publishing or referring to the transcript at trial made the deposition part of the trial court record. Respondent did not seek reconsideration of this court's ruling, and the ruling is the law of this case.

Respondent should have obeyed this court's order. But instead, he slipped the transcript into his new appendix, flagrantly ignoring the order. Indeed, his replacement brief cites to the deposition transcript, arguing that defense counsel's reference to the deposition during trial "makes the deposition part of the trial court record." Respondent's brief, page 3 fn.2. This was the identical argument that Orth made in his opposition to the previous motion to strike—an argument that this court rejected.

(3) *3 R.App. 692 through 4 R.App. 790 (Tab 8):* This document purports to be appellant Capanna's designation of expert witnesses. The identical document was included in respondent's first appendix, at 9 R.App. 2200 through 10 R.App. 2298 (Tab 8). Appellant's previous motion to strike argued that the document was not file-stamped, and that a search of the district court eflex website did not indicate that the document was ever filed.

In opposition to the previous motion to strike, respondent conceded that discovery disclosures are often not formally part of the trial court record, because parties are not required to file such documents with the court. (Opp. page 5) He argued that Capanna's Designation of Expert Witnesses was part of the trial court record, because it was attached as an exhibit to an opposition to a motion, which was filed with the district court. (*Id.*) The numerous exhibits that were allegedly attached to Dr. Capanna's Designation ***were not attached*** to the document that was actually

filed with the court; but respondent argued that he should be allowed to provide the missing documents anyway, as "necessary context for this Court to evaluate the legal issues on appeal." (*Id.* at pages 5-6)

This court struck the document, thereby rejecting respondent's arguments. Nevertheless, respondent has now flagrantly violated and ignored this court's clear order, and he has included the identical document in his new appendix, at 3 R.App. 692 through 4 R.App. 790 (Tab 8).

Because this court has already stricken the same document, the law-of-the case doctrine applies, and the document should again be stricken from respondent's new appendix.

Improper reference to unpublished order

In respondent's first appendix, he included a copy of a 2007 unpublished order of this court. The document was included at 1 R.App. 1-3 (Tab 1). Appellant's previous motion to strike argued that this was an old unpublished order in an unrelated case, and that it was not in the district court record. We also argued that reliance on the old unpublished order would violate NRAP 36(c), which prohibits citations to unpublished orders issued before January 1, 2016.

Respondent's opposition to the previous motion to strike did not address the rule prohibiting citations to old unpublished orders. Instead, respondent argued that

the unpublished order should be considered "persuasive authority in this appeal." (Opp. page 3)

This court's order of May 10, 2017, granted the motion to strike and ordered the clerk to strike the unpublished order from respondent's appendix. (Order of May 10, 2017, page 3, item 1)

Although respondent's new appendix does not include the prohibited unpublished order, his replacement brief actually cites to the unpublished order, offering it as precedent for respondent's position in this appeal. Respondent's Brief, page 29. This is a truly brazen violation of this court's ruling. This court struck the unpublished order from respondent's appendix, obviously rejecting respondent's argument that the unpublished order should be considered legitimate persuasive authority. There can be no excuse for respondent's conduct regarding the unpublished order, and all references to it should be stricken from the replacement combined brief.

Request for sanctions, and conclusion

Respondent's replacement brief and his new appendix demonstrate flagrant and outrageous disregard for this court's order of May 10, 2017. There can be no plausible excuse. Accordingly, in addition to striking the offending portions of the new appendix and the replacement brief, respondent should be ordered to pay "such attorney fees as [the court] deems appropriate to discourage like conduct in the

future." NRAP 38(b). Appellant requests an award of fees incurred for preparation of the original motion to strike and this motion to strike, including the necessary time spent studying both lengthy appendices and the district court record, as part of the preparation of the motions to strike. Appellant respectfully suggests than an award of $5,000 would be reasonable and appropriate compensation, and such an amount would hopefully discourage similar conduct in the future.

For the foregoing reasons, this motion should be granted; respondent's new appendix should be stricken, or portions of the appendix should be stricken; references to the stricken matters should be also eliminated from respondent's new replacement brief; and sanctions should be imposed.

DATED: May 31, 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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