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

REPLY IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S NEW APPENDIX

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Appellant's present motion to strike is simple. Respondent filed an appendix containing 14 prohibited documents, and appellant moved to strike them. The court granted appellant's motion and ordered the clerk to strike the documents from the appendix. The court **did not** give respondent permission to file a second appendix. Respondent did not request reconsideration or clarification of the court's order. The order was crystal clear. But without first requesting permission, respondent filed a second appendix that contained three of the identical documents that this court struck from the first appendix. The present motion asks the court to strike the same documents yet again—this time with sanctions.

The court should strike respondent's entire new appendix

This court's order of May 10, 2017 ordered the clerk to strike 14 of the 43 tabbed documents in respondent's appendix. The remaining 29 tabbed documents were left intact. The court did ***not*** grant respondent permission to file another appendix. Respondent argues that his new appendix was somehow allowed by the court's order, because he was required to file a replacement brief that complies with the size-limitation. (Opp. p. 2) His argument makes no sense. To reduce the size of his brief, he merely needed to edit the brief by cutting unnecessary words and by shortening his arguments. If anything, the court's order striking 14 documents from respondent's appendix should have made it **easier** for respondent to cut the size of his brief.

Respondent also argues that his new appendix should not be stricken because this court's order was based on the premise that the stricken documents were not part of the district court record. (Opp. p. 3) He argues that "a reasonable interpretation" of this court's order is that respondent should be allowed to file a new appendix. (*Id.*) His opposition (1) fails to address the fact that he already made the same argument in opposition to appellant's first motion to strike—an argument that this court obviously rejected; (2) ignores the fact that he did not seek reconsideration of the court's order striking the 14 documents; and (3) completely ignores appellant's argument regarding the law-of-the-case doctrine.

When this court issued its order striking 14 tabbed documents from respondent's appendix, respondent needed to live with the order, obey it, and file a replacement brief complying with size limitations and appendix citation requirements. If he believed that a second appendix was necessary for some reason, he should have requested permission to file a second appendix—demonstrating legitimate reasons to do so. Accordingly, his second appendix should be stricken in its entirely, as well as any references to the new appendix in his replacement brief.

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. Respondents arguments to the contrary are meritless.

(1) *1 R.App. 1-192 (Tab 1):* This is the deposition transcript of appellant Capanna. It was in respondent's first appendix at Tab 11. It was not file stamped or signed by the witness or the court reporter. Respondent's opposition to appellant's first motion to strike argued that respondent's counsel published the deposition during trial, "which makes it part of the trial record." (First Opp. pgs. 6-7). This court ordered the clerk to strike the transcript from respondent's appendix. (Order of May 10, 2017, page 3, item 6)

Nevertheless, respondent has now included **the identical transcript** in his new appendix, at Tab 1. His opposition makes virtually the same argument that he made (and that this court rejected) in his opposition to the first motion to strike, namely, that publishing the deposition during trial makes it part of the trial court record. (Opp. pp. 4-5) The only real difference is that he now argues that the transcript "was filed and stamped by the clerk." (Opp. p. 4) **The transcript in his second appendix is exactly the same transcript that was in his first appendix, i.e., the transcript that this court struck.** Like the stricken transcript, the transcript in respondent's new appendix is not file-stamped, not signed by the witness, and not signed by the court reporter. The identical transcript was already stricken and should be stricken again.

(2) *1 R.App. 193 through 2 R.App. 281 (Tab 2):* This document appears 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. In his opposition to appellant's previous motion to strike, respondent argued that the transcript was published during the trial, and referenced by counsel at trial, which makes it part of the record. (Prior Opp. 2).

This court already rejected respondent's argument and struck the transcript. Respondent now makes the same argument again, namely, that the transcript is part of the record because attorneys referred to it during their examination of trial witnesses. (Opp. pp. 5-6) Respondent's brief can certainly refer to trial testimony that refers to testimony from the deposition transcript. But the entire deposition transcript itself is not part of the official record; it is not file-stamped or signed by the witness; and this court already struck it. The document should be stricken again.

(3) *3 R.App. 692 through 4 R.App. 790 (Tab 8):* This document appears to be appellant's designation of expert witnesses. **The identical document was included in respondent's first appendix, at Tab 8.** Respondent now makes the exact same argument he made in opposition to the first motion to strike, namely, that the disclosure was attached as an exhibit to a motion opposition, and it is therefore fair game for the appendix. (Opp. pp. 6-7) Respondent's argument, however, is highly misleading, because the numerous medical exhibits allegedly attached to the disclosure were **not included** with the disclosure exhibit that was attached to the motion opposition. Respondent does not deny this. As such, the medical exhibits

contained with the disclosure in respondent's new appendix were **not** part of the district court record regarding the motion opposition. There is no distinction between the document that this court already struck and the document in respondent's new appendix. As such, the new document should be stricken.

Improper reference to unpublished order

This court struck the old unpublished order that was contained in respondent's first appendix. He now cites to the same order in his replacement brief. His citation is a flagrant violation of NRAP 36(c). And the citation certainly violates the spirit of this court's order striking the unpublished order from respondent's first appendix.

Request for sanctions, and conclusion

Respondent's opposition fails to provide legitimate arguments and justifications for his flagrant disregard for this court's order of May 10, 2017. Accordingly, respondent should be ordered to pay "such attorney fees as [the court] deems appropriate to discourage like conduct in the future." NRAP 38(b).

DATED: June 14, 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 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: 6/14/17