

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,

Appellant/Cross-Respondent,

vs.

BEAU R. ORTH,

Respondent/Cross-Appellant.

Case No. 69935

District Court Case No. A048041

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Elizabeth A. Brown
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RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO STRIKE PORTIONS OF RESPONDENT'S APPENDIX AND PORTIONS OF RESPONDENT'S COMBINED ANSWERING BRIEF ON APPEAL AND OPENING ON CROSS-APPEAL, REFERRING TO THE STRICKEN PORTIONS

COMES NOW Respondent/Cross-Appellant, Beau R. Orth ("Beau"), acting by and through his counsel, Dennis M. Prince, Esq. and Kevin T. Strong, Esq., of Eglet Prince, and hereby opposes Appellant/Cross-Respondent's Motion to Strike Portions of Respondent's Appendix and Portions of Respondent's Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal, Referring to the Stricken Portions.

I.

ARGUMENT

Appellant/Cross-Respondent Albert H. Capanna, M.D. (“Capanna”) prematurely presumes that several documents contained in Beau’s appendix to his combined answering brief on appeal and opening brief on cross-appeal. In reality, several documents that Capanna objects to are actually part of the trial court record and are even included in Capanna’s own appellate index. Further, Capanna improperly objects to the inclusion of deposition transcripts in Beau’s index because these transcripts were published during the trial, which makes them part of the record on appeal.

NRAP 10(a) states the trial court record contains *the papers and exhibits filed in the district court*, the transcript of the proceedings, if any, the district court minutes, and the district court’s docket entries (emphasis added). An appendix must include any portion of the record that is necessary for the Supreme Court of Nevada’s determination of the issues on appeal. *Cuzze v. Univ. & Cmty. College Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Beau addresses each of the relevant portions of his appendix that are at issue below:

A. Supreme Court of Nevada Order

(1) 1 R.App. 1 through 1.R.App. 3 of Beau's appendix is the Nevada Supreme Court Order in *Kinstel v. Eighth Judicial District Court*, in which this Court issued a writ of mandamus and instructed the district court to vacate its order excluding the plaintiff's experts' reports that were supplemented after the discovery cut-off because plaintiff timely produced the reports more than 30 days before trial. This Court specifically stated "the rule's language is plain: supplemental reports are due at least 30 days before trial, unless otherwise ordered by the court." See 1 R.App. 1 through 1 R.App. 3. This unpublished order is persuasive authority and supports Beau's argument that he timely produced the future care opinions of his retained medical expert and treating physician more than 30 days before trial, which is a legal issue Capanna has brought on appeal. One of the exceptions this Court has acknowledged, albeit in a different context, for citing to unpublished orders is to analogize similar factual examples to show this Court's consistency. *In re Discipline of Laub*, 2002 Nev. LEXIS 113, at *45-47. Thus, Beau requests that this Court not strike its Order from his appendix because it establishes this Court's view regarding the timeliness of supplemental expert disclosures before trial.

B. The Parties' Disclosure of Documents and Expert Witnesses pursuant to NRCP 16.1

(2) 2 R.App. 339 through 6 R.App. 1427 of Beau's appendix is his NRCP 16.1 List of Witnesses and Documents and the attached exhibits. It is important to note that any party's disclosures produced during discovery in accordance with NRCP 16.1 will never contain a file-stamp because they are exchanged between the parties during discovery. The Nevada Rules of Civil Procedure also do not require the parties to file such discovery documents with the district court.

Here, Capanna includes the pleading portion of Beau's NRCP 16.1 Disclosures in his appendix at A. App. 830 through A. App. 837. Capanna also attached it as an exhibit to his Opposition to Plaintiff's Motion to Strike Untimely Disclosures and Counter-Motion to Exclude Improper "Supplemental" Disclosures and Claims for Future Damages, filed on August 9, 2015 with the trial court. *See* A. App. 808 through A. App. 825 and A. App. 830 through A. App. 837. Thus, this document is part of the trial court record, a fact that Capanna has already acknowledged.

Although Beau includes the exhibits attached to his NRCP 16.1 List of Witnesses and Documents in his appendix, these documents consist of Beau's medical and billing records, all of which were used during trial as part of the parties' trial exhibits. These exhibits are also relevant to the appellate issue

regarding the admissibility of Dr. Cash's future care opinions because the medical records show that his opinions were not new or unexpected. "Copies of relevant and necessary exhibits shall be clearly identified, and shall be included in the appendix as far as practicable." NRAP 30(d).

(3), (4) 6 R.App. 1431 through 9 R.App. 2199 is Capanna's First Supplement to NRCP 16.1 Early Case Conference Disclosure of Witnesses and Documents and 9 R.App. 2200 through 10 R.App. 2298 is Capanna's Designation of Expert Witnesses. The pleading portion of Capanna's First Supplement to his NRCP 16.1 Disclosures was not formally a part of the trial court record because the parties are not required to file these discovery pleadings with the court. However, the exhibits attached to the disclosure are part of the trial court record because they are Beau's medical and billing records, all of which were again part of both parties' trial exhibits and used during trial.

Capanna's Designation of Expert Witnesses is part of the trial record because the pleading portion is attached as an exhibit to Plaintiff's Opposition to Defendant's Motions in Limine, filed with the district court on July 9, 2015. *See* Supplemental Appendix to Respondent/Cross-Appellant's Combined Opening and Answering Brief, at Supp. R.App. 4073 through Supp. R.App. 4096. Beau includes the exhibits attached to Capanna's Designation of Expert Witnesses in his appendix to provide the necessary context for this Court to evaluate the legal issues

on appeal. The inclusion of said exhibits is permissible under NRAP 10(a) and NRAP 30(d) (“Copies of relevant and necessary exhibits shall be clearly identified, and shall be included in the appendix as far as practicable”).

C. E-mail

(5) 10 R.App. 2299 is an e-mail exchange between Beau’s counsel and Capanna’s counsel confirming an extension of the parties’ initial expert disclosure deadline. This e-mail is not part of the trial court record and Beau does not object to the removal of this e-mail from his appendix.

D. Deposition Transcripts

Capanna objects to the inclusion of several deposition transcripts in Beau’s appendix because the depositions are not file-stamped. This argument is illogical because deposition transcripts are discovery documents that are typically not filed. However, they can still become part of the trial court record through various ways such as attaching them as exhibits to motions or by publishing them during the trial. All of the deposition transcripts included in Beau’s appendix are part of the trial court record as detailed below.

(6) 10 R. App. 2232 through 11 R.App. 2511 is the deposition transcript of Dr. Capanna. Dr. Capanna never signed his deposition and the original copy of his deposition with the court reporter’s signature remains with the trial court. Beau’s counsel also published Dr. Capanna’s deposition during trial, which makes it part

of the trial court record. *See* August 26, 2015 Transcript of Proceedings – Jury Trial, at 124:4-7; *see also*, *Perry v. Law Enforcement Elecs.*, 88 Nev. 180, 181, 495 P.2d 355, 356 (1972).

(7) 11 R.App. 2556 through 11 R.App. 2644 is a certified copy of the deposition transcript of Beau Orth that is signed by the court reporter. *Id.* Further, Capanna’s counsel referenced this deposition numerous times throughout the trial, including during his direct examination of Reynold Rimoldi, M.D. *See* August 31, 2015 Partial Transcript of Proceedings – Jury Trial, at 88:20 – 90:16. Therefore, Beau properly includes this transcript in his appendix because it is part of the trial court record.

(8) 11 R.App. 2670 through 11 R.App. 2737 is a copy of the deposition transcript of Frank Kevin Yoo, M.D. that is signed by the court reporter. *See* 11 R.App. 2723. Additionally, Capanna attached a copy of Dr. Yoo’s deposition as an exhibit to his Motion RE Application of NRS 50.275 and to Exclude Testimony Regarding Future Treatment and Surgery Made without Scientific Basis, which is included in his appendix. *See* A. App. 300 through A. App. 338. As such, Dr. Yoo’s deposition transcript is part of the trial court record.

(9) 11 R.App. 2738 through 12 R.App. 2820 is the deposition transcript of Allan Joel Belzberg, M.D. Counsel for Beau published Dr. Belzberg’s deposition during trial, which makes it part of the trial court record. *See* August 24, 2015

Transcript of Proceedings – Jury Trial – Testimony of Dr. Allan Belzberg, at 78:8-12.

(10) 12 R.App. 2848 through 12 R.App. 2906 is the deposition transcript of Reynold Rimoldi, M.D. Beau attached a copy of Dr. Rimoldi’s deposition transcript to his Reply in Support of Motion to Strike Untimely Disclosures and Opposition to Defendant’s Counter-motion to Exclude Improper “Supplemental” Disclosures and Claims for Future Damages. Capanna included Beau’s Reply and a copy of Dr. Rimoldi’s deposition transcript in his Appendix at A. App. 1095 through A. App. 1111 and A. App. 1200 through A. App. 1228. Accordingly, Dr. Rimoldi’s deposition transcript is part of the trial court record, a fact that Capanna has acknowledged.

(11), (12) 12 R.App. 2907 through 12 R.App. 2922 and 12 R.App. 2932 through 12 R.App. 2999 are volumes 1 and 2 of the deposition transcript of Andrew Cash, M.D. This deposition is part of the trial court record because Capanna’s counsel specifically referenced the deposition transcript of Dr. Cash when questioning witness Frank Yoo, M.D. *See* August 25, 2015 Transcript of Proceedings – Jury Trial – Testimony of Frank Kevin Yoo, M.D., at 92:15 – 93:8; 115:17-21. Capanna also attached Volume II of Dr. Cash’s deposition transcript to his Motion RE Application of NRS 50.275 and to Exclude Testimony Regarding Future Treatment and Surgery Made without Scientific Basis. *See* A. App. 438

through A. App. 455. As such, Dr. Cash's deposition transcript is part of the trial court record.

E. British Medical Journal Article and Related May 1, 2016 Letter

(13), (14) 17 R.App. 4057 through 4059 is a letter from Martin A. Makary, M.D. to the Centers for Disease Control and Prevention requesting changes to the way the CDC collects the U.S.'s national vital health statistics. Dr. Makary requested the CDC revise its methodology to account for medical error because it is the third leading cause of death in the U.S. Dr. Makary authored a report that details medical error as the third leading cause of death, which was published in the British Medical Journal on May 3, 2016 and is included in Beau's appendix at 17 R.App. 4060 through 17 R.App. 4064. Beau includes these documents in his appendix as persuasive authority because the articles provide context to the pervasive problem of medical malpractice in the U.S., which further supports Beau's argument that NRS 42.021 is unconstitutional. Beau also includes this article and letter in his appendix to make it easy for this Court to evaluate when making its decision. This Court has previously acknowledged its appreciation of the persuasive effect of journal articles. *Dzack v. Marshall*, 80 Nev. 345, 350, n.1a, 393 P.2d 610, 612 (1964).

II.

CONCLUSION

Based on the foregoing, counsel for Respondent/Cross-Appellant Beau Orth respectfully requests that this Court deny Appellant/Cross-Respondent Albert H. Capanna, M.D.'s Motion to Strike the various portions of Respondent/Cross-Appellant Beau Orth's Appendix as outlined above.

DATED this 27th day of February, 2017.

EGLET PRINCE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 27th day of February 2017. Electronic service of the foregoing **RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO 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** shall be made in accordance with the Master Service

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