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 Case No. 70227 District Court Case No. A648041

RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO STRIKE RESPONDENT'S NEW APPENDIX, OR PORTIONS THEREOF, AND TO STRIKE PORTIONS OF RESPONDENT'S COMBINED BRIEF 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 Respondent's New Appendix, or Portions thereof, and to Strike Portions of Respondent's Combined Brief Referring to the Stricken Portions

I.

ARGUMENT

Appellant/Cross-Respondent Albert H. Capanna, M.D. ("Capanna") moves to strike Respondent/Cross-Appellant's new appendix as a fugitive filing. However, Capanna fails to consider that Beau had to make substantial edits to his

combined brief to comply with the Court's denial of his Motion for Permission to Exceed Type-Volume Limitation for Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal, which necessitated the filing of a revised appendix. Beau's edits lead to a reduction in the word count of his combined brief from 20,699 words to 18,492 words, or a difference of 2,207 words. Out of abundance of caution and for purposes of simplicity, Beau provided this Court with a revised appendix to reference, particularly because the Order states: "We trust respondent/cross-appellant will make appropriate references in the replacement brief." *See* Order, p. 3, n.2. Beau reasonably believed that he had to provide a new appendix to this Court in order to comply with its request because Beau's initial combined brief was not accepted and filed. Capanna mischaracterizes Beau's filing of a new appendix as an act in contravention of this Court's Order. In actuality, Beau met his obligation to provide this Court with legally sufficient references to the trial court record. Therefore, Beau respectfully requests that this Court deny Capanna's motion to strike Beau's new appendix, which coincides with his extensive revisions to his combined brief.[1]

[1] Beau's new appendix included indices in various volumes that do not match the corrected indices included in volumes 1, 2, and 9 and that also do not list the documents in chronological order. Should this Court accept Beau's new appendix, Beau respectfully requests that this Court allow Beau the opportunity to correct the indices for each of the volumes in his new appendix.

A. Beau Requests This Court To Not Strike Any Portions Of His New Appendix Because All Documents Are Part Of The Trial Court Record

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). Beau's new appendix complies with Rule 10(a) to ensure that this Court considers all issues that have properly appeared in the record on appeal. *Carson Ready Mix v. First Nat'l Bank*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). Specifically, this Court struck all documents contained within Beau's first appendix "…that were not filed in the district court…." *See* Order, p. 2. This Court goes on to say that it "…trust[s] respondent/cross-appellant will make appropriate references in the replacement brief." *Id.* at p. 3, n.2. Beau interpreted this language from the Court to mean that Beau should ensure that all references in his new brief refer to all documents that were filed in the district court, or that are otherwise part of the trial court record. This is a reasonable interpretation, particularly because this Court provided no other basis to strike the documents contained in Beau's initial appendix. As detailed below, Beau's new combined brief that complies with this Court's Order references all documents that are part of the trial court record. Therefore, Capanna fails to provide this Court with a sufficient legal basis to strike these documents.

B. Documents At Issue

(1) 1 R.App. 1 through 1.R.App. 192 is the deposition transcript of Dr. Capanna. Beau included this in his new appendix because his counsel specifically published Dr. Capanna's deposition during trial, which is referenced in the trial transcript. This was filed and stamped by the clerk in open court. In fact, the trial court retained custody of the transcript as part of the trial record. Beau also included the appropriate reference in his revised brief that this transcript was published during the trial. *See* Respondent's Combined Answering and Opening Brief, p. 3, n.2. This Court has expressly declined to consider deposition transcripts on appeal that were not published at the trial. *See Thurston v. Thurston*, 87 Nev. 365, 367, 487 P.2d 342, 343-44 (1971) ("Moreover, much of Ms. Thurston's argument on this issue on appeal relies on depositions and exhibits thereto ***which we have not considered because these depositions were not employed or published at the trial."*** (emphasis added)).[2]

[2] Capanna incorrectly asserts that Beau failed to cite any legal authority for the proposition that a deposition transcript automatically becomes part of the trial court record because the deposition transcript is opened and published at trial or because the attorney referenced the transcript at trial. Beau actually cited to *Perry v. Law Enforcement Elecs.*, 88 Nev. 180, 181, 495 P.2d 355 (1972) in which this Court failed to consider a deposition transcript that was not published because there was nothing in the record on appeal which would indicate what was contained within the deposition. *Perry*, which was decided after *Thurston*, reaffirms this Court's view that depositions will not be considered on appeal if they were not "…employed or published at trial…." *Thurston*, 87 Nev. at 367, 487 P.2d at 343-

Contrary to Capanna's assertion, it is not obvious that the Court rejected Beau's argument that publishing a deposition during trial makes it part of the trial court record. This is so because the Court struck the documents it believed were not part of the trial court record and were not properly referenced in Beau's initial combined brief. Beau has now resolved both of those concerns. This also shows that Beau did not ignore the Court's Order, but simply complied with it by providing the requisite references to prove that all documents contained within his new combined brief and appendix are part of the trial court record. Capanna's deposition is part of the trial court record and Beau respectfully requests that it remain as part of his newly filed appendix.

(2) 1 R.App. 193 through 1 R.App. 281 is the deposition transcript of Beau Orth. Although this deposition transcript was not formally published during the trial, it is still part of the trial court record because Capanna's counsel used the deposition transcript at the trial. Specifically, Capanna's counsel used Beau's testimony to assist him in his examination of his retained medical expert, Reynold L. Rimoldi, M.D.:

> MR. LAURIA: The testimony of Mr. Orth in this case.
>
> Q. I'm going to show you the deposition testimony of Mr. Orth, starting at page 56, line 11 and it goes on…

44.

. . .

MR. LAURIA: Page 57, starting at line 1.

. . .

Answer; Yeah, I hadn't – there just was not – let me go onto page 58….

See 3 R.App. 496:20 – 498:16.

This Court expressly concluded that it will not consider deposition transcripts on appeal that were not ***used*** or published at trial. *Thurston*, 87 Nev. at 367, 487 P.2d at 343-44. Capanna cannot dispute that his trial counsel "employed" or used Beau's deposition transcript to aid in his examination of Dr. Rimoldi. Therefore, Beau provided this Court with the appropriate reference in his revised brief to show that Beau's deposition transcript is part of the trial court record and is properly included in his new appendix.

(3) 3 R.App. 692 through 4 R.App. 790 is Capanna's Designation of Expert Witnesses and the exhibits attached thereto. Although only the pleading portion of the expert designation was attached as an exhibit to Plaintiff's Opposition to Defendant's Motions in Limine, Beau properly included the exhibits to the expert designation in accordance with NRAP 30(d), which states: "Copies of relevant and necessary exhibits shall be clearly identified, and shall be included in the appendix as far as practicable." Thus, Beau's inclusion of these exhibits was proper because

they became part of the trial court record when Beau attached the expert designation as an exhibit to his opposition that was filed with the trial court.

C. Beau Did Not Violate This Court's Order By Including References In His Brief to *Kinstel v. Eighth Judicial Dist. Court*

Based on Beau's revisions to his brief to comply with this Court's Order, Beau removed a copy of the Nevada Supreme Court's Order in *Kinstel v. Eighth Judicial Dist. Court*, No. 48191 (Jan. 30, 2007) from his appendix. However, this Court did not order that Beau remove all references to *Kinstel* throughout his combined brief. In fact, this Court did not even reference Beau's reliance on this Court's *Kinstel* Order as persuasive authority in his brief. This Court also did not strike any reference to the *Kinstel* Order pursuant to NRAP 36(c). This Court has acknowledged that citing to an unpublished Order is appropriate to analogize similar factual examples to show this Court's consistency. *In re Discipline of Laub*, 2002 Nev. LEXIS 113, at *45-47 (Jan. 9, 2002). The facts of the *Laub* Order are analogous to the facts here because Capanna asserts that Beau did not timely produce the future care opinions of his retained medical expert and treating physician within 30 days before trial. Therefore, Capanna misinterprets the extent of this Court's Order and his request to exclude all references to this Order should be denied.

D. Beau Properly Included Additional Documents In His New Appendix That Are Part Of The Trial Court Record

This Court did not file or accept Beau's submission of his first combined brief because he exceeded the maximum word count allotted under NRAP 28.1(e)(2)(B)(i). As a result, Beau made extensive revisions to ensure his combined brief complies with the 18,500-word limit, which required him to cite to additional documents that are part of the trial court record. Given these extensive revisions, Beau reasonably believed that it was necessary to file a new appendix in order to comply with this Court's Order. The new documents in Beau's appendix provide necessary support to the arguments contained within his new combined brief. Specifically, Beau included Plaintiff's Opposition to Defendant's Motions in Limine (8 R.App. 1831 – 8. R.App. 1854); the Jury Trial Transcript of Allan Belzberg, M.D. (4 R.App. 791 – 4 R.App. 884); and Day 9 of the Jury Trial Transcript (2 R.App. 409 – 3 R.App. 666). These additional documents are clearly part of the trial court record because they include transcripts of the trial and a pleading that was filed with the district court. Nev. R. App. P. 10(a) Therefore, Beau requests that this Court allow these documents to remain in Beau's new appendix.

E. Capanna Is Not Entitled To Sanctions Because Beau Properly Complied With This Court's Order

In a passing reference, Capanna asks this Court to issue sanctions against Beau to pay attorney fees Capanna incurred in filing both of his motions to strike because Beau disregarded the Court's Order. Capanna's request is without merit. First, Capanna solely relies on NRAP 38(b), which permits this court ***"on its own motion,"*** to require a party who has frivolously taken an appeal, to pay attorney fees and costs related thereto. *See* Nev. R. App. P. 38(b) (emphasis added). As such, Capanna is not permitted to move under Rule 38(b) for a sanctions award.

An award of attorney's fees and costs under NRAP 38(b) is discretionary and "…permitted only in those contexts where an appeal has been frivolously taken or been processed in a frivolous manner." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998); *Board of Gallery of History Inc. v. Datecs Corp.*, 116 Nev. 286, 288 n.2, 994 P.2d 1149, 1150 (2000). Rule 38(b) is not applicable here because Beau has not filed a frivolous civil appeal and has not disregarded this Court's Order. Rather, Beau made significant edits to his brief to comply with the 18,500 word limit, included appropriate references in his new brief to documents that are part of the trial court record, and provided a revised appendix for the benefit of this Court. This proves that Beau has not "misused" the appellate processes of this Court and therefore,

Capanna is not entitled to a $5,000 award for attorneys' fees and costs. *See* Nev. R. App. P. 38(b). Therefore, Capanna has failed to provide this Court with any legal basis to support an attorneys' fee award of $5,000 related to Beau's filing of a new appendix.

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 Respondent's New Appendix, or Portions thereof, and to Strike Portions of Respondent's Combined Brief Referring to the Stricken Portions.

DATED this 7th day of June, 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 7th day of June 2017. Electronic service of the foregoing **RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO STRIKE RESPONDENT'S NEW APPENDIX, OR PORTIONS THEREOF, AND TO STRIKE PORTIONS OF RESPONDENT'S COMBINED BRIEF REFERRING TO THE STRICKEN PORTIONS** shall be made in accordance with the Master Service List as follows:

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