

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

No. 70227

REPLY IN SUPPORT OF MOTION TO DISMISS CROSS-APPEAL

Dr. Capanna hereby replies to Orth's opposition to the motion to dismiss Orth's cross-appeal.

TIMELINESS OF MOTION TO DISMISS

Orth starts by complaining that Capanna did not move to dismiss the cross-appeal until several months after Orth filed his notice of cross-appeal. Opp. 1. Capanna's motion was filed shortly after Orth filed his brief on the cross-appeal, and within a few days after this court issued its order striking both of Orth's appendices. Before making a final decision on whether to move to dismiss the cross-appeal, Capanna's counsel wanted to see what arguments Orth would make in his opening brief on the cross-appeal, potentially impacting the aggrieved party issue. Upon seeing Orth's concession in his brief that the jury "awarded Beau \$136,300.49, the

entirety of his past medical expenses” (RAB 61), Capanna’s counsel made the decision to proceed with the motion. Counsel was perfectly justified in waiting until Orth filed his brief, and until this court issued its order on Capanna’s motion to strike Orth’s appendix, before finally deciding to file the motion to dismiss.

In any event, the motion raises a jurisdictional defect. See *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 7229, 734 (1994) (holding that this court has appellate jurisdiction only where the appeal is brought by an aggrieved party). A jurisdictional challenge may be raised at any time. See *Vaile v. District Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002).

ORTH’S ARGUMENTS ARE WITHOUT MERIT

Orth is not an aggrieved party, because the jury awarded all of his medical expenses, without a reduction for collateral source payments. Orth does not actually contend that he **is** an aggrieved party. He contends, however, that even if he is not an aggrieved party, this court nevertheless has discretion to consider his constitutional challenge to the statute. Every case on which he relies involved the question of whether the constitutional challenge was waived by a party who failed to object or raised the issue for the first time on appeal. Opp. 4-5. Orth’s cited cases did not involve challenges to this court’s jurisdiction. It is one thing to say that this court has jurisdiction to consider a constitutional issue that was waived in the district court, in a case where this court has jurisdiction over the appeal. But it is quite

another thing to say that this court may consider a constitutional issue even though the court has **no jurisdiction** over the appeal in the first place.

Orth contends that this court should entertain his cross-appeal, because the cross-appeal raises an important issue that needs clarification, and the issue involves public policy. Opp. 6-7. Again, none of the opinions cited by Orth for this contention involved cases where this court considered an issue even though the court did not have jurisdiction.

Orth contends that Capanna's argument is analogous to a mootness argument. Opp. 7-8. Having re-characterized Capanna's argument, Orth then responds to the mootness question. Opp. 8. Even his mootness response, however, falls short. Orth relies on *Bisch v. Las Vegas Metro. Police Dept.*, 129 Nev. Adv. Op. 36, 203 P.3d 1108 (2013). Opp. 8. *Bisch* recognized a very limited exception to the mootness prohibition, where: "(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, **and** (3) the matter is important." *Id.* at ____, 203 P.3d at 1113 (emphasis added). The use of the word "and" is conjunctive, requiring **all three** requirements to be satisfied. See *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1294, 149 P.3d 51, 58 (2006) (recognizing that statute's use of conjunctive "and" required both parts of sentence to be satisfied).

Here, Orth's opposition states: "Beau concedes that the first *Bisch* factor is not applicable . . ." Opp. 8. Nonetheless, he argues that the other two *Bisch* factors

are satisfied. But by conceding that the first factor is not applicable here, Orth's argument based on *Bisch* must fail, because all three factors must exist.

The *Bisch* exception to mootness is sometimes referred to as dealing with issues that are "capable of repetition, yet evading review." E.g., *Kashman Equipment Co. v. West Edna Assoc.*, 132 Nev. Adv. Op. 69, 380 P.3d 844, 853 (2016). Although Orth's constitutional statutory challenge might be capable of repetition, the challenge is certainly not something that will evade review. Any medical malpractice plaintiff whose verdict is reduced due to application of the collateral source statute will be able to challenge the statute on appeal.¹

Finally, Orth argues that he has standing to raise the constitutional challenge (and he is not merely asking for an advisory opinion), because the issue might arise on remand. Opp. 9-10. He relies on *Shuette v. Beazer Homes Holdings Corp.* 121 Nev. 837, 124 P.3d 530 (2005), where the court addressed an issue that "may arise on remand." Opp. 9-10. In *Shuette*, however, the court had already decided to reverse and remand. Thus, the new trial was a certainty. In the present case, on the

¹ Orth cites three unpublished 2015 orders, in violation of NRAP 36(c). Opp. 2. Even if this court considers these orders, all three involved pretrial rulings that were challenged in writ proceedings. This court denied all three petitions, because the petitioners had adequate remedies at law (presumably appeals from final judgments). This itself shows that Orth's constitutional challenge is **not** something that will evade review. The challenge merely needs to be made by a party who is aggrieved by the statute, at which time this court can appropriately decide the constitutional issue.

other hand, the issue will only arise again if this court reverses the judgment, **and** if the case does not settle before trial, **and** if the second jury applies collateral source evidence to reduce Orth's award of past medical expenses (something the first jury decided not to do). Thus, the issue presents only a mere prospect of a future problem that may never actually occur.

For the foregoing reasons, Orth is not aggrieved by the jury's verdict, and the court should dismiss his cross-appeal.

DATED: Aug. 1, 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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