

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

vs.

LAS VEGAS REVIEW-JOURNAL,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO.:
73525

DISTRICT COURT CASE NO.:
A-17-750151-W

MOTION TO STRIKE APPELLANT’S OPENING BRIEF

Respondent Las Vegas Review-Journal (“Review-Journal”), by and through its counsel, Margaret A. McLetchie and Alina M. Shell, hereby moves this Court pursuant to Nevada Rule of Appellate Procedure 28(j) for an order striking the Opening Brief filed by Appellant Clark County School District (“CCSD”) in this matter. This Motion is supported by the attached Memorandum of Points and Authorities.

DATED this 1st day of February, 2018.

/s/ Alina M. Shell

Margaret A. McLetchie, Nevada Bar No. 10931

Alina M. Shell, Nevada Bar No. 11711

MCLETCHIE SHELL LLC

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Counsel for Respondent, Las Vegas Review-Journal

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Rule 28(a) of the Nevada Rules of Appellate Procedure (“NRAP”) provides specific guidance regarding the content an appellant must include in an opening brief filed with this Court. *See* NRAP 28(a)(1)-(12). Of relevance here, NRAP 28(a)(8) mandates that the statement of facts in an opening brief must include “appropriate references to the record.” Similarly, NRAP 28(a)(10)(A) requires that, in the argument portion of an opening brief, an appellant must include its legal contentions “and the reasons for them, with citations to the authorities and part of the record on which the appellant relies.”

In addition, NRAP 28(e)(1) mandates that “every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.” *See also M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 908 n. 2, 193 P.3d 536, 541 (2008) (arguments in briefs must present appellant’s contentions with citations to the parts of the record upon which appellant relied.) Pursuant to NRAP 28(j), briefs that do not comply with NRAP 28 “may be disregarded or stricken . . . and the court may assess attorney fees or other monetary sanctions.”

The Opening Brief filed by CCSD in this matter fails to comply with these rules, and thus must be stricken. As detailed below, CCSD’s Opening Brief includes

facts that are not supported by the record and is riddled with inaccurate citations to Appellant's Appendix. In addition, CCSD's Opening Brief fails to comply with NRAP 28(e)'s mandate to cite to both the page and volume number of the Appellant's Appendix. As discussed in the declaration of counsel attached to this memorandum, the extra-record facts and errors in CCSD's Opening Brief made preparing the Review-Journal's Answering Brief difficult and excessively time consuming. Accordingly, in addition to striking the Opening Brief, the Review-Journal moves this Court to assess attorney's fees against CCSD to compensate the Review-Journal for the time its counsel expended in drafting the Answering Brief.

II. FACTS

As discussed in detail below, the Opening Brief filed by CCSD in this matter does not comply with several provisions NRAP 28. The Opening Brief contains factual allegations in the Statement of Facts that are not supported by the record, which are nevertheless relied upon in a portion of the Argument section, thereby violating NRAP 28(a)(8) and NRAP 28(a)(10)(A). In addition, none of CCSD's citations to Appellant's Appendix identify the Appendix volume, and the overwhelming majority of the Appendix citations are incorrect. Indeed, upon review of the Opening Brief, counsel could locate only one accurate record citation. Thus, CCSD's Opening Brief also fails to comport with NRAP 28(e). These multiple errors and violations of this Court's rules made preparing the Review-Journal's Answering

Brief unnecessarily difficult and time-consuming.

A. CCSD's Opening Brief Includes Unsupported Factual Allegations.

As described in the Review-Journal's Answering Brief, CCSD appeals an order entered by the district court pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.011(2), directing CCSD to disclose records pertaining to its investigation of allegations of sexual harassment and misconduct by Clark County School Board Trustee Kevin Child. (*See generally* Answering Brief ("AB"), pp. 3-18.)

In its Opening Brief, CCSD provides a detailed description of the withheld records that are at issue in this appeal. (Opening Brief ("OB"), pp. 5-7.) CCSD does not, however, provide any citations to the record to support its factual descriptions of the withheld records. (*See id.*) Upon reading the description of the withheld records, counsel for the Review-Journal found there were no record citations. (*See* Declaration of Alina M. Shell ("Shell Decl."), ¶¶ 5-6.) More importantly, however, counsel noted that CCSD's description of the withheld records was completely unfamiliar. (Shell Decl. ¶ 7.) Counsel then spent a significant amount of time reviewing CCSD's Appellant's Appendix and the Review-Journal's Respondent's Appendix trying to find any evidence CCSD had previously provided the Review-Journal with the description of the withheld records that was in any way similar to the description contained in the Opening Brief. (Shell Decl. ¶¶ 8, 9.) Counsel could

find no record support for CCSD’s factual assertions. (Shell Decl. ¶ 9.) CCSD’s inclusion of extra-record facts therefore violates NRAP 28(a)(8)’s requirement that the statement of facts in an appellant’s brief must include “appropriate references to the record.”

Additionally, CCSD improperly relies on these extra-record facts in the argument portion of its brief, thereby violating NRAP 28(a)(10)’s requirement that an appellant’s legal contentions must contain “citations to the . . . parts of the record on which the appellant relies.” Specifically, in its Opening Brief, CCSD argues that should this Court order disclosure of the Withheld Records, it should permit CCSD to redact “any information that identifies a CCSD employee including but not limited to the names of job titles and schools.” (OB, p. 47.) In arguing that the Court should permit it to engage in such broad redaction, CCSD relies on the unsupported factual allegations regarding the contents of the withheld records. (*See* OB, p. 46, ll. 8-17.) Because this argument relies on unsupported factual allegations, this Court should not consider it in deciding the instant appeal. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (“This court need not consider the contentions of an appellant where the appellant’s opening brief fails to cite to the record on appeal.”) (citation omitted).

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B. CCSD's Record Citations Are Inaccurate and Incomplete.

In addition to including factual allegations and arguments that are unsupported by the record, CCSD's Opening Brief fails to comply with NRAP 28(e)(1)'s requirement that "every assertion in briefs regarding matters in the records *shall be supported by a reference to the page and volume number*, if any, of the appendix where the matter relied on is to be found." NRAP 28(e)(1) (emphasis added).

CCSD has violated NRAP 28(e)(1) in two ways. First, the Appellant's Appendix consists of two volumes. Thus, under NRAP 28(e)(1), each reference to the record should include a citation to both the page and volume number. CCSD's Opening Brief, however, only refers to the page number. Second, and much more problematically, virtually every citation to a particular page or pages in the Opening Brief is inaccurate. Starting with the Jurisdictional Statement, CCSD indicates that the order from which it is appealing is contained at pages 286-302 of Appellant's Appendix. (OB, p. 1.) This is wrong, as the order at issue in this case appears in Volume II of Appellant's Appendix at pages 294-310.

This failure to include accurate record citations plagues the entire brief. Indeed, based on counsel for the Review-Journal's review of all the citations in the Opening Brief, it appears that CCSD included only one correct citation to Appellant's Appendix. (*See* Opening Brief, p. 15, 1. 5; *see also* Shell Decl., ¶ 15.)

These related violations of NRAP 28(e)(1) made responding to the arguments and assertions contained in CCSD's Opening Brief unnecessarily difficult and time-consuming. (Shell Decl. ¶ 16.) In preparing the Answering Brief, counsel for the Review-Journal could not rely on CCSD's Opening Brief to direct her to the appropriate volume and page number. (Shell Decl. ¶ 17.) Instead, counsel was required to root through Appellant's Appendix to determine whether CCSD had properly represented the record of the case. (Shell Decl. ¶ 17.)

III. ARGUMENT

A. This Court Should Strike CCSD's Opening Brief.

Pursuant to NRAP 28(j), all briefs filed with this Court "must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial, or scandalous matters." Upon motion by a party, this Court has the discretion to strike or disregard a brief that is not in compliance with NRAP 28. *Id.* In this instance, CCSD's Opening Brief includes unsupported facts and is riddled with citation errors. Accordingly, this Court should exercise its discretion to strike CCSD's Opening Brief from the record. Alternatively, if the Court is not inclined to strike CCSD's Opening Brief in its entirety, the Review-Journal respectfully requests the Court disregard those portions of the brief that rely on unsupported factual allegations; specifically, the portion of the Opening Brief at pages 5-7 which includes unsupported descriptions of the withheld records at issue,

and pages 46 through 48, which rely on the unsupported description of the withheld records to argue for broad redaction.

B. The Court Should Award Reasonable Attorney's Fees to the Review-Journal.

Finally, pursuant to NRAP 28(j), this Court may impose attorney's fees or other monetary sanctions. As discussed in the attached declaration of counsel, the numerous inaccuracies in CCSD's Opening Brief made the already difficult task of drafting an Answering Brief even more difficult and time consuming, because it required counsel to expend additional time trying to locate the portions of the record CCSD miscited in its brief. (Shell Decl., ¶¶ 18, 19.)

Should this Court be inclined to grant the Review-Journal's request for attorney's fees or monetary sanctions, counsel for the Review-Journal can provide the Court with documentation of the time and resources counsel expending in reviewing the Opening Brief and Appellant's Appendix and drafting the Answering Brief.

Alternatively, if the Court is not inclined to award the Review-Journal attorney's fees for CCSD's failure to submit a brief in compliance with NRAP 28, the Review-Journal respectfully requests this Court assess monetary sanctions as it deems appropriate for CCSD's failure to comply with the rules of this Court.

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IV. CONCLUSION

For the reasons set forth above, the Review-Journal respectfully requests this Court grant its Motion to Strike Appellant CCSD's Opening Brief.

Respectfully submitted this 1st day of February, 2018.

/s/ Alina M. Shell

Margaret A. McLetchie, Nevada Bar No. 10931

Alina M. Shell, Nevada Bar No. 11711

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Counsel for Respondent, Las Vegas Review-Journal

DECLARATION OF ALINA M. SHELL

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Alina M. Shell, declare, pursuant to Nev. Rev. Stat. § 53.330, as follows:

1. I am counsel for Respondent Las Vegas Review-Journal (“Review-Journal”) in this matter. I have personal knowledge of all matters contained herein and am competent to testify thereto.

2. The Clark County School District (“CCSD”) is appealing an order of a district court for the Eighth Judicial District Court granting the Review-Journal’s petition for a writ of mandamus filed pursuant to Nev. Rev. Stat. § 239.011.

3. CCSD filed its Opening Brief and Appellant’s Appendix with this Court on December 11, 2017.

4. I, along with co-counsel Margaret A. McLetchie, reviewed CCSD’s Opening Brief and Appendix in preparing the Review-Journal’s Answering Brief, which was filed with this Court on January 24, 2018, along with a Respondent’s Appendix.

5. In my review of CCSD’s Opening Brief, I determined that pages 5-7 of the brief included a factual description of the contents of the withheld records at issue in this matter.

6. That factual description including no citations to the Appellant's Appendix.

7. I also noted that I was completely unfamiliar with the factual allegations at pages 5 through 7 of CCSD's Opening Brief.

8. Upon noting that CCSD had not cited to its Appellant's Appendix in describing the withheld records in its Opening Brief, I and Ms. McLetchie reviewed the Appellant's Appendix to determine whether this factual description appeared in the record below.

9. After extensive review of the record, neither I nor Ms. McLetchie could locate factual support for CCSD's description of the withheld records.

10. I also reviewed the Respondent's Appendix to determine if there was factual support in the record for CCSD's description of the withheld records but found none.

11. The process of reviewing Appellant's Appendix and Respondent's Appendix to locate any reference to CCSD's unsupported factual allegations was time-consuming but necessary because CCSD relied on its unsupported factual allegations to argue for broad redaction of the withheld records. (*See* Opening Brief, pp. 46-48.)

12. In addition to including unsupported facts in its Opening Brief, CCSD's citations to its Appellant Appendix were riddled with errors which also made

drafting the Answering Brief difficult.

13. First, contrary to NRAP 28(e), CCSD's citations to its Appellant Appendix did not include references to the Appendix volumes.

14. Second, and far more problematic, virtually none of CCSD's page citations to the Appendix were correct.

15. In preparing the instant motion, I reviewed CCSD's Opening Brief to determine whether any of its citations to the Appendix were correct. Based on that review, I could only locate one correct Appendix citation at page 15, line 5 of the Opening Brief.

16. These related violations of NRAP 28(e)(1) made responding to the arguments and assertions contained in CCSD's Opening Brief unnecessarily difficult and time-consuming.

17. In preparing the Answering Brief, I could not rely on CCSD's Opening Brief to direct me to the appropriate volume and page number. This required me to root through Appellant's Appendix to determine whether CCSD had properly represented the record of the case.

18. Based upon a preliminary review of time entries in this matter, I estimate that I spent approximately 5 hours at my customary rate of \$350.00 per hour addressing the citation errors, that Ms. McLetchie spent approximately 1 hour at the rate of \$450.00 per hour, and that attorney Leo Wolpert spent approximately 1.5

hours at the rate of \$175.00 per hour reviewing CCSD's Appellant's Appendix to find record support for the factual assertions in its Opening Brief. In addition, I estimate based on my review of the time entries that I spent approximately 3 hours at my customary rate of \$350.00 preparing the instant Motion.

I certify under the penalty of perjury that the foregoing is true and correct.

EXECUTED this 1st day of February, 2018.

/s/ Alina M. Shell

Margaret A. McLetchie, Nevada Bar No. 10931

Alina M. Shell, Nevada Bar No. 11711

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Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO STRIKE APPELLANT’S OPENING BRIEF was filed electronically with the Nevada Supreme Court on the 1st day of February, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Carlos McDade, General Counsel
Adam Honey, Asst. General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146
*Counsel for Appellant,
Clark County School District*

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC