

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Appellants,

vs.

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito,

Respondent.

Case No. 79355

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Appeal from the Second Judicial District Court, the Honorable Connie J. Steinheimer Presiding

**APPELLANTS' MOTION TO STRIKE
RESPONDENT'S AMENDED APPENDIX AND RESPONDENT'S
AMENDED ANSWERING BRIEF**

AND

MOTION TO STAY BRIEFING

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I. INTRODUCTION

Plaintiff/Respondent, William A. Leonard, Jr., Trustee for the Bankruptcy Estate of Paul Anthony Morabito (“Trustee”), has improperly included documents in the Respondent’s Amended Appendix that were not filed in the District Court. These new documents are also referenced in Respondent’s Amended Answering Brief. According to NRAP 10(a); NRAP 30(c)(1); and *Carson Ready Mix, Inc. v. First Nat’l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981), the Trustee is not authorized to include documents outside the District Court record in an appendix filed in this Court. Therefore, the Court should strike the entire amended answering appendix and either strike the entire amended answering brief, with leave to resubmit a corrected brief, or disregard the Trustee’s arguments and related references to the amended answering appendix within the amended answering brief.

II. LEGAL ARGUMENT

According to NRAP 10(a), “The trial court record consists of the papers and exhibits **filed in the district court**, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.” (emphasis added). NRAP 30(c)(1) mandates, “All documents included in the appendix shall be placed in chronological order by the dates of filing beginning with the first document filed, and **shall bear the file-stamp of the district court clerk**, clearly showing the date of the document was filed in the proceedings below.” (emphasis

added). With respect to the presentation of documents not filed in the District Court, this Court has articulated, “We cannot consider matters not properly appearing in the record on appeal.” *Carson Ready Mix, Inc. v. First Nat’l Bank of Nevada*, 97 Nev. 474, 476, 635 P. 2d 276, 277 (1981); *see also State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962) (striking documents in writ petition proceeding that were not part of the underlying court’s record).

In the instant case, the Trustee included in its amended answering appendix an *unfiled* copy of the transcript of the Bankruptcy Court’s June 6, 2019 hearing, regarding Case No. BK-N-15-05019-GWZ. The Trustee also includes in its amended answering appendix a Nevada Supreme Court Order dismissing appeal and regarding motions, regarding Case No. 80214, filed on March 6, 2020. Neither of these documents were included in the District Court record, and neither document bears the file-stamp of the District Court. The amended answering appendix does not contain any other documents. Thus, the entire amended answering appendix should be stricken according to NRAP 10(a), NRAP 30(c)(1), and *Carson Ready Mix*.

In Respondent’s amended answering brief, the Trustee refers to its amended answering appendix on pages 2 and 23. The Trustee focuses his entire argument section on pages 22 and 23 of his amended answering brief on the Bankruptcy Court’s oral comments, which were never presented to the District Court. As such,

the Court should order the Trustee to file a corrected amended answering brief that omits the legal arguments based upon the documents outside the District Court record in the amended answering appendix. Alternatively, the Court should disregard the arguments related to the new documents in Respondent's amended appendix.

Appellants' reply brief is currently due on September 28, 2020. However, Appellants do not yet know whether the Trustee's amended answering appendix and amended answering brief will be stricken. Accordingly, the Court should stay briefing in this matter pending the resolution of this motion.

III. CONCLUSION

In summary, the Court should strike the Trustee's amended answering appendix according to NRAP 10(a), NRAP 30(c)(1), and *Carson Ready Mix* and either strike Respondent's amended answering brief or disregard the legal arguments based upon the new documents referenced in Respondent's amended appendix. Until the Court resolves this issue regarding the Trustee's amended answering appendix and amended answering brief, the Court should stay the briefing.

Dated this 28th day of September, 2020.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *APPELLANTS' MOTION TO STRIKE RESPONDENT'S AMENDED APPENDIX AND RESPONDENT'S AMENDED ANSWERING BRIEF AND MOTION TO STAY BRIEFING* was filed electronically with the Supreme Court of Nevada on the 28th day of September, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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