

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER KHORSANDI, M.D.;
CHRISTOPHER KHORSANDI, M.D.,
PLLC; CATHERINE LE
KHORSANDI,

Appellants,

v.

SMITH PLASTIC SURGERY, INC.
and LANE F. SMITH, M.D.,

Respondents.

Case No.: 80957

District Court

Case No. A-19-804819-C

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MOTION TO STRIKE

I. INTRODUCTION

Dr. Christopher Khorsandi ("Dr. Khorsandi"), Catherine Le ("Ms. Le"), and Christopher Khorsandi, M.D., PLLC (the "Practice") (collectively the "Khorsandi Parties" or "Appellants") hereby move to strike Smith Plastic Surgery, Inc. and Lane F. Smith, M.D.'s (hereinafter "Respondents") Appendix pages 14-106 attached to the Answering Brief (RA014-RA106). Additionally, Appellants move to strike pages 8-11 of Respondents' Answering Brief (beginning with "Assuming this statistical improbability . . ."), as well as the entirety of Section I(C) of the Respondents' Answering Brief.

In gross violation of the Rules of Appellate Procedure, Respondents' Appendix includes six documents consisting of 93 pages that were not part of the district court's record when deciding the matter which is the subject of this appeal.

Respondents make no designation of their extra-record "evidence." Instead, they improperly include the documents in the Appendix to the Answering Brief in an attempt to expand the record to include information that was never considered by the district court. These additional documents and arguments should therefore be swiftly stricken. NRAP 10(a)-(b); 30(b)(4).

II. ARGUMENT

It is fundamental to appellate practice that the record on appeal consists of the appendices filed pursuant to Rule 30. *See* NRAP 30. NRAP 30(a) provides that when a joint appendix is not prepared, each party may prepare its own, separate appendix to attach to its brief. While this rule permits the parties to prepare their own appendix, it does not provide unfettered, *carte blanche* authority to include any documents or additional "evidence" which a party may have gathered since the appeal was filed. NRAP 30(b)(4) prescribes the restrictions and limitations on what a respondent may include in their appendix to its answering brief.

This Court has long held that "[w]e have no power to look outside of the record of a case." *Alderson v. Gilmore*, 13 Nev. 84, 85 (1878); *see also Marvin v. Fitch*, 126 Nev. 168, 173, 232 P.3d 425, 429 (2010) ("this court may not consider matters outside of the district court record on appeal"); *Mauriello v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 128 Nev. 916,

381 P.3d 638 (2012) ("This court will not consider evidence that was not submitted to or considered by the district court").¹ This long-held principle of a reviewing court's strict adherence to the record on appeal is not just a motif of judicial precedent – the Nevada legislature similarly acknowledged its importance and codified the principle into state law. *See* NRS § 177.165 ("All appeals from a district court to the appellate court of competent jurisdiction . . . shall be heard on the original papers and the reporter's transcript of evidence or proceedings").

As we have repeatedly seen, when parties to an appeal attempt to surreptitiously include additional facts or evidence which was not considered by the district court, this Court has refused to consider that evidence. *See Moore v. Moore*, 78 Nev. 186, 189, 370 P.2d 690, 691 (1962) (refusing to consider additional evidence and allegations in defendant's answer filed after the grant of summary judgment, noting "[t]he respective motions for summary judgment, filed in the court below, sought to dispose of the entire case upon the record *as it then existed*"). Similarly, in *White Lantern, LLC v. Deutsche Bank National Trust Co. as Trustee for Certificate-Holders of Greenpoint Mortgage Funding Tr. 2005-HY1*, this court reviewed a grant of summary judgment and found it would

¹ This Court has clarified that only in the most limited of circumstances, such as “determining whether appellants have waived their appeal,” does an appellate court possess the authority to supplement the record. *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005). No such circumstances exist here.

be improper to allow the introduction of subsequent deposition testimony into the record and, thus, rejected the evidence. 134 Nev. 1031, *1 n.2, 430 P.3d 532, (2018) (unpublished) (emphasis added) ("We have **not** considered the deposition testimony included in respondent's appendix as it does not appear that deposition was referenced in or attached to the summary judgment pleadings or otherwise considered by the district court in granting summary judgment").

In their Answering Brief and Appendix, Respondents disregard the clearly-established judicial and statutory precedent, and instead slyly cite additional "evidence" and other offending documents not contained in the record hoping to tip the scales in their favor.² Recognizing that they failed to meet their burden under NRS 41.660(3)(b) to present prima facie evidence in opposition to the Khorsandi Parties' Special Motion to Dismiss, Respondents in this case seek to bolster their position by having this Court look outside the record on appeal to "preliminary research" that Respondents allege support their claim in motions filed ***subsequent to*** the district court's adjudication of the motion on appeal. Because the record on appeal is bereft of even the smallest iota of evidence of the Khorsandi Parties' involvement in the alleged defamatory Yelp reviews – beyond

² In addition to being outside the record, Respondents' information does not support their assertions. Instead, Respondents offer unauthenticated attorney work product and illegible printouts that relate to other, non-defamatory posts outside of this lawsuit. Respondents' bold assertions about the Khorsandi Parties' involvement are not supported.

self-serving conclusory statements and mere speculation – Respondents disregard the Nevada Rules of Appellate Procedure in a brazen attempt to deceive this Court.

Respondents seek to put these extra-record documents before the Court to bolster an argument with evidence which was not presented at the district court level. Respondents attempt to supplement the record with 93 pages of a motion filed *nine months* after the district court decided the issue before this Court and the notice of appeal was filed. (*See* Respondent's' Opening Br. 8-11, 27; RA014-106.). These documents are not part of the record that is before this Court.

In addition, those portions of Respondents' Answering Brief which purport to rely on such improper evidence should be stricken. *See Buhecker v. R.B. Petersen & Sons Const. Co., Inc.*, 112 Nev. 1498, 1499, 929 P.2d 937, 938 (1996) (striking portions of an appellate brief relying on evidence which was not a part of the record). *See also* NRAP 28(j) ("All briefs . . . must be . . . free from burdensome, irrelevant, immaterial or scandalous matters.") Specifically, pages 8-11 (beginning with "Assuming this statistical improbability . . . ") of Respondents' Answering Brief purports to rely in its entirety upon extraneous evidence, though much of the attorney-prepared argument finds no support in Respondents' Appendix. Moreover, Section I(C) cites generally to unreadable printouts offered in support of motions filed months after the district court adjudicated the motion to dismiss which is the subject of the instant appeal. The

arguments do not stand, and are entirely void of merit without these improper additions to the record. As such, the argument itself is in error and must be stricken.

III. CONCLUSION

Respondents attempt to circumvent the Nevada Rules of Appellate Procedure and established judicial precedent in order to augment the record and place extraneous evidence before this Court in some sort of appellate free-for-all. Accordingly, this Court should issue an order striking pages 14-106 of the Appendix attached to the Answering Brief and pages 8-11 of Respondents' Answering Brief (beginning with "Assuming this statistical improbability . . ."), as well as the entirety of section I(C) of Respondents' Answering Brief, which rely on information outside of the record on appeal.

DATED this 4th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 4th day of November, 2021, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **MOTION TO STRIKE** to the following:

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/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC