

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0600

IN THE MATTER OF:	)	
SALVATRICE MUSCLE,	)	
Plaintiff and Appellant,	)	
	)	<b>APPELLANT'S RESPONSE TO</b>
VS.	)	<b>MOTION FOR TEMPORARY</b>
	)	<b>STAY &amp; RULE 10(h)(ii) RELIEF</b>
ANTONIO SANTIN, M.D.	)	
Defendant and Appellee.	)	
	)	

On appeal from the Montana Eighth Judicial District Court,  
County of Cascade,  
Cause No. ADV-17-0728  
Honorable David Grubich Presiding

Allen P. Lanning  
Law Office of Allen P. Lanning, PC  
PO Box 544  
Great Falls, MT 59403-0544  
406-727-9272  
allenplanninglaw@gmail.com

*Attorneys for Appellant Plaintiff and  
Appellant, Salvatrice Muscle*

Gary Kalkstein  
Joe Newman  
Hall Booth Smith, PC  
101 East Front Street, Suite 402  
Missoula, MT 59807-8568  
406-317-0070  
GKalkstein@hallboothsmith.com  
JNewman@hallboothsmith.com  
*Attorneys for Appellee, Antonio Santin*

Appellant Salvatrice Muscle respectfully requests that the Court deny the Rule 10(h)(ii) relief requested by Appellee Antonio Santin for an alleged violation in filing the Appellant's Opening Brief on August 31, 2023. Ms. Muscle does not oppose Dr. Santin's request for a temporary stay of the thirty day period to file the answer brief.

### **STATEMENT OF THE ISSUE**

Appellee Antonio Santin asserts that the Appellant Salvatrice Muscle's opening brief filed August 31, 2023, violates this Court's order by making additional changes to the brief in violation of this Court's Order of January 20, 2023, and asks that the brief be stricken pursuant to Rule 10(7)(h)(ii), M.R.App.P.

### **ARGUMENT**

After trial but before the appeal was filed, the court reporter retired. On October 21, 2022, Sarah McClain, HR/Court Services Director, identified Michael Raffel, Official Court Reporter for the First Judicial District, as the court reporter who would complete the transcript. There were delays in obtaining the transcript due to the court reporter's workload, missing audio for the final day of trial, and efforts to obtain the missing record.

The transcript was not prepared before Ms. Muscle's Opening Brief was filed on January 19, 2023. The Court issued a noncompliance Order noting three deficiencies to be corrected, including the style of the caption, missing references to

the record due to lack of a finalized transcript, and the lack of an appendix. The Order noted that the opening brief was premature due to the lack of a complete record since the transcript had not been filed. It stated that no revisions other than those specified should be made to the brief.

On May 4, 2023, this Court ordered the opening brief to be filed by May 24, 2023. On May 5<sup>th</sup>, 2023, this Court rescinded that order and ordered Appellant Salvatrice Muscle to file a status report on June 1, 2023. Upon receipt of Appellant's status report containing an estimated completion date for the transcript and requesting a briefing schedule, this Court ordered on June 6, 2023, that the "Appellant shall prepare, file, and serve the opening brief on or before August 31, 2023".

The Transcript was filed on August 24, 2023. On August 31, 2023, Appellant filed her Opening Brief. The three deficiencies identified by the Court were corrected.

Appellee takes issue with de minimus clerical, grammatical, or syntax changes, including adding a hyphen to a term, removing a duplicative word, and adding emphasis to a nine-word phrase.

Appellee takes issue with modest changes and additions to paragraphs 7, 10, and 16, and the inclusion of a new paragraph 11, which flow directly from receipt of the completed transcript.

Appellee takes issue with the inclusion of argument referencing and analyzing *Kipfinger v. OBGYN Assoc.*, 2023 MT 44, 411 Mont. 269, 525 P.3d 1183, a subsequent decision by this Court relevant to the issue of whether the district court in this case erred in precluding some of Salvatrice Muscle's medical expert's opinions and granting summary judgment to defendant, and new references to other relevant decisions.

***a. The Court's prohibition on other revisions should not be applied in the unique context of this case.***

The no changes provision included in an Order of Noncompliance is intended to prevent a party opportunistically inserting additional content after having made technical errors in its brief. Usually, the corrected brief must be filed within a short period of time. Here, unique circumstances suggest deviation is appropriate:

1. Appellant's opening brief was prematurely filed; it was not due. The time for briefing had not even begun due to the lack of a transcript. Salvatrice could have filed no brief then and filed her opening brief as it is now without any sanction. She should not be punished for an excess of caution in filing her brief prematurely.
2. Salvatrice Muscle did not have the transcript available. She could not review it, analyze it, incorporate it into her brief, or cite to it, other than limited excerpts previously obtained from the court reporter before she retired. This

put her at a disadvantage to all other appellants in drafting her brief. Allowing changes and additions to the brief based on information in the previously unavailable transcript promotes fairness and justice by returning Appellant to the position of all other appellate litigants once she received the transcript.

3. De minimus corrections to the brief affect no substantive rights.

4. Court reporter retirement and reassignment, court reporter workload, and missing audio delayed transcript completion for seven months, a time frame not contemplated by the rule relating to correcting a noncompliant brief. The policy of the rule against changes does not apply. Indeed, the premature filing actually gave Antonio Santin significantly more time to analyze, research, and draft his response to Appellant's arguments.

5. In the interim, this Court decided *Kipfinger*, which is directly relevant to the issue of whether the district court erred in excluding opinions of Appellant's medical expert and granting summary judgment on certain claims based on those exclusions. Inclusion of argument relating to that case promotes fairness and judicial, providing Antonion Santin the opportunity to address those arguments in his answer brief and providing this Court access to more refined argument on its applicability.

6. The Appellant's request for a briefing schedule upon transcript completion in her status report of June 1, 2023 and Court's Order of June 6,

2023, setting such a schedule by requiring that the opening brief be prepared, filed and served by August 31, 2023, can be read fairly and in good faith as resetting the day for filing of an opening brief, making the limiting language of the January order inapplicable.

***b. Striking the brief is not the appropriate remedy.***

Antonio Santin has not been prejudiced by changes to the brief, he has benefitted by it. There is a strong preference for determination of appeals on their merits.

Supporting Authority:

*Acton v. Rahn, 611 S.W.3d 897, 901 (Mo. Ct. App. 2020)(Whether to dismiss an appeal for briefing deficiencies is discretionary, and such discretion should not exercised unless the deficiency impedes disposition on the merits; rather, appellate court prefers to resolve an appeal on the merits of the case rather than to dismiss an appeal for deficiencies in the brief.)*

Appellant Salvatrice Muscle requests that the Court deny the relief requested and order a thirty day extension of time in which Appellant Antonio Santin shall file his answer brief.

Dated this 25<sup>th</sup> day of September 2023.

Allen P. Lanning  
Allen P. Lanning  
Attorney for Plaintiff and Appellant, Salvatrice  
Muscle

## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing Brief is proportionately spaced, has a 14-point typeface, and consists of 1062 words.

*Allen P. Lanning*  
Allen P. Lanning

## **CERTIFICATE OF SERVICE**

I, Allen Page Lanning, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 09-25-2023:

Gary Darling Kalkstein (Attorney)  
101 E. Front Street, Suite 402  
Missoula MT 59802  
Representing: Antonio Santin  
Service Method: eService

Joe J. Newman (Attorney)  
101 E Front Street, Suite 402  
Missoula MT 59802  
Representing: Antonio Santin  
Service Method: eService

Electronically Signed By: Allen Page Lanning  
Dated: 09-25-2023