

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE
CORONER/MEDICAL EXAMINER,
Appellant,

vs.

LAS VEGAS REVIEW-JOURNAL,
Respondent.

Electronically Filed
Sep 21 2018 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
SUPREME COURT CASE NO:
74604

DISTRICT COURT CASE NO.:
A-17-758501-W

**OPPOSITION TO MOTION TO STRIKE RESPONDENT'S APPENDIX
AND MOTION TO STAY BRIEFING**

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Fax: (702) 425-8220
Email: maggie@nvlitugation.com
Counsel for Respondent, Las Vegas Review-Journal

I. INTRODUCTION

Given that the documents included in the Las Vegas Review-Journal's appendix are judicially noticeable and necessary to respond to the Coroner's arguments, the Court should deny the Coroner's Motion to Strike. The two cases cited by the Coroner in its motion do not support its position, as neither case addressed whether the parties in those cases included judicially noticeable documents that were not included in the lower court proceedings.

Throughout its Opening Brief, the Coroner relies heavily on the "legal underpinnings" of a 1982 Attorney General Opinion, AGO 82-12, to argue that the district court erred in directing it to release the autopsy records the Las Vegas Review-Journal requested pursuant to the Nevada Public Records Act. (*See, e.g.*, OB at pp. 2, 5, 8, 14, 16, 17, 18, 27, 29-32, 48.) Those "legal underpinnings," however, are obsolete considering the multiple amendments the Nevada Legislature has made to strengthen the NPRA in the years since AGO 82-12 was issued. To respond fully to the Coroner's arguments about AGO 82-12, the Review-Journal included judicially noticeable facts about the legislative amendments made to the NPRA in 1993 and 1997 in both its Respondent's Appendix and its Answering Brief. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) ("[W]e may take judicial notice of facts that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is

not subject to reasonable dispute.’’) (citing Nev. Rev. Stat. § 47.130(2)(b)). Given that the legislative histories included in the Review-Journal’s Appendix are “sources whose accuracy cannot be reasonably questioned,” this Court can consider them, as well as the Review-Journal’s arguments about them in its Answering Brief.

Additionally, in its Opening Brief, the Coroner relied on a single sentence from this Court’s opinion in *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 (2015) to support its assertion that it can charge the Review-Journal an hourly rate for redactions. (OB, p. 42.) In order to demonstrate that single sentence the Coroner relied only addressed the actual costs LVMPD incurred in obtaining the records at issue in that case from an outside vendor (and did not in any way address redaction costs), the Review-Journal included judicially noticeable facts from the district court’s file-stamped order in the *Blackjack* case.

The Coroner’s Motion to Strike essentially asks this Court to rely only on selected legislative history regarding the NPRA, and further asks this Court to ignore court records which show that the Coroner’s factual representations about the Court’s decision in *Blackjack* are inaccurate. The Court should deny this request.

II. ARGUMENT

A. The Review-Journal Properly Included Judicially Noticeable Facts in its Response to the Coroner’s Arguments Regarding AGO 82-12.

In *Polk v. State*, 126 Nev. 180, 233 P.3d 357 (2010), this Court noted that there are “unforgiving consequences resulting from a respondent’s failure to respond

to issues raised on appeal.” *Polk*, 126 Nev. at 181, 233 P.3d at 357-58. Particularly relevant here, the Court noted that it has “determined that a party confessed error when that party’s answering brief effectively failed to address a significant issue raised in the appeal.” 126 Nev. at 185, 233 P.3d at 360 (citations omitted). In this case, the Coroner has made the district court’s rejection of the Coroner’s reliance on AGO 82-12 as a basis for withholding public records a “significant issue” on appeal. (See, e.g., OB at pp. 2, 5, 8, 14, 16, 17, 18, 27, 29-32, 48.) To effectively respond to the Coroner’s arguments on this significant issue, the Review-Journal argued in its Answering Brief—as it did in the proceedings below—that AGO 82-12 is obsolete because it was based on an older and far less robust version of the NPRA (*See* 1 JA008; 1 JA044; 1 JA154-55; 2 JA248-49; *see also* AB, pp. 18-19, 43-45.)

To address that argument, the Review-Journal included the legislative history of Assembly Bill 365, a 1993 bill which strengthened the provisions of the NPRA (1 RA001-066), and the legislative history of Senate Bill 123, a 2007 bill which further strengthened the NPRA. (1 RA67-3 RA572.) Indeed, the changes made to the NPRA by Senate Bill 123 were a focus of this Court’s opinion in *Reno Newspapers, Inc. v. Gibbons*. *See Gibbons*, 127 Nev. 873 at 878, 266 P.3d 623, 626 (2011).

Pursuant to Nev. Rev. Stat. § 47.150, this Court may take judicial notice of facts “generally known or capable of verification from a reliable source.” *Mack v.*

Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). To qualify as “judicially noticeable,” the facts cited by a party must be “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.” Nev. Rev. Stat. § 47.130(2)(b). The legislative histories included in the Review-Journal’s Respondent’s Appendix are precisely the sort of facts which this Court may take judicial notice of. *see also Carolene Prod. Co. v. United States*, 323 U.S. 18, 28 (1944) (holding that in determining legislative purpose of an act, the Supreme Court would take judicial notice of report of committees of the House of Representatives and the Senate); *see also Heck v. Reed*, 529 N.W.2d 155, 163 (N.D. 1995) (“A court may take judicial notice of legislative facts when interpreting a statute, particularly when the statute is grounded in public policy.”). They are the direct and complete histories of legislation considered and adopted by the Nevada Legislature. Tellingly, the Coroner does not object to the accuracy of these documents—only that they were not included in the district court proceedings. (*See* Motion, p. 2) (noting that the histories do not “contain the file-stamp of the District Court”).¹

///

///

¹ The Coroner’s Motion to Strike does not contain page numbering. In assigning page numbers to the Motion, the Review-Journal does not include the cover page of the Motion.

B. The Nevada Rules of Appellate Procedure Do Not Bar Submission of the Judicially Noticeable Documents in the Review-Journal's Appendix.

The Review-Journal acknowledges that Nevada Rule of Appellate Procedure 30 outlines the materials which *must* be included in appendices to appellate briefs. Nothing in the rule, however, bars a party from including judicially noticeable materials which may be necessary to the Court's resolution of the issues on appeal. Indeed, NRAP 30(b)(4) appears to contemplate that a respondent may include in its appendix "those documents necessary to rebut appellant's position on appeal which are not already included in appellant's appendix."² Because the Coroner invited this Court to consider AGO 82-12—which was premised on the 1965 version of the NPRA—as a legally cognizable basis for withholding the autopsy records at issue in this case, it opened the door to a discussion about the legislative history of the NPRA.

The only alternative the Review-Journal had to including the legislative histories in an appendix was to cite hyperlinks to the legislative histories available on the Nevada Legislature's Research Library webpage. Rather than require this Court to access the histories online and scroll through the hundreds of pages to verify the accuracy of the Review-Journal's factual representations, the Review-Journal

² The Coroner also cites to Nevada Rule of Appellate Procedure 10(a). (Mot., p. 1) Rule 10(a), however, simply defines what constitutes a "trial court record," and does not prohibit inclusion of the judicially noticeable documents included in the Review-Journal's Appendix.

opted to include the histories in an appendix that the Court could more efficiently access and review. Indeed, were the Court to grant the Coroner's Motion and order the Review-Journal to refile its Answering Brief as the Coroner requests (Mot., p. 2), the Review-Journal would simply replace its Appendix citations with citations to the appropriate hyperlinks for the legislative histories that comprise the bulk of that Appendix.

C. The Review-Journal Properly Included the Judicially Noticeable District Court Order to Respond to the Coroner's Inaccurate Portrayal of the Facts and Holding of *Blackjack Bonding*.

In its Opening Brief, the Coroner cited to a single sentence from this Court's opinion in *Blackjack Bonding* to support its argument that it may charge the Review-Journal an hourly rate for redactions. Specifically, the Coroner argued as follows:

In prior case law this Court has recognized the difference between the extraordinary use of personnel and the maximum copy charge of 50 cents. For example, in *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 615 (Nev. 2015), this Court did not disturb the District Court's order requiring the requester to "bear the costs of production."

(OB, p. 42.) This argument, however, misrepresented both the facts of the *Blackjack* case and the import of this Court's holding. As discussed in the Review-Journal's Answering Brief, the Court's holding in *Blackjack Bonding* simply upheld the district court's order directing Blackjack Bonding to compensate the Las Vegas Metropolitan Police Department for the actual costs associated with obtaining jail call records from a third-party vendor. (AB, pp. 51-52.) To support its factual

assertions about the record in *Blackjack Bonding* and to demonstrate the infirmity of the Coroner's reliance on this Court's opinion to support its argument for charging the Review-Journal an hourly fee for redacting public records, the Review-Journal included a file-stamped copy of the district court's order. (3 RA573-76.)

As with the legislative histories, the Coroner does not dispute the veracity of the district court order; it only disputes the fact that it was not part of the record of this case in the district court proceedings. (Mot., p. 2.) However, by misrepresenting the facts and holding in *Blackjack Bonding* in its Opening Brief, the Coroner forced the Review-Journal to include the district court order in its Respondent's Appendix to demonstrate the inaccuracy of its arguments. Thus, the Court should deny the Coroner's request to strike the order from the Review-Journal's Appendix.

D. The Cases Cited by the Coroner in its Motion to Strike Are Inapposite.

The Coroner cites only two cases in support of its request that this Court strike the Review-Journal's Respondent's Appendix and ignore certain portions of the Answering Brief—*Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981) and *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 370 P.2d 672 (1962) (*See* Mot., pp. 1, 2.) Neither case, however, forecloses a party's inclusion of judicially noticeable documents in an appellate appendix.

The issue this Court considered in its opinion in *Carson Ready Mix* was whether the appellant had preserved its objections to the trial court's jury instructions

as required by Nevada Rule of Civil Procedure 51. *Carson Ready Mix*, 97 Nev. at 475, 635 P.2d at 276. Although the appellant asserted that it had complied with Rule 51 “by raising specific objections and citing relevant authority to the court below during a conference in the judge's chambers,” these objections were not included in the record on appeal. *Id.*, 97 Nev. at 475, 635 P.2d at 277. In response to a motion to dismiss filed by the respondent, appellant submitted an affidavit from trial counsel and proposed instructions that were not part of the court record. *Id.* This Court rejected the appellant’s arguments, holding that “[t]he attempt by appellant’s counsel to supply the missing predicate for appellate review by affidavit and by a document not appearing in the record is of no avail. We cannot consider matters not properly appearing in the record on appeal.” *Id.*, 97 Nev. at 476, 635 P.2d at 277.

The issue here is not whether either party preserved issues for appellate review. Rather, the issues are (1) whether the district court properly held that AGO 82-12 was not a cognizable basis for withholding the autopsy records requested by the Review-Journal, and (2) whether the district court properly held that the Coroner did not have the authority to charge the Review-Journal an hourly fee for redacting those records. The Review-Journal’s inclusion of judicially noticeable documents that are necessary to respond to the Coroner’s arguments and factual representations regarding those two issues is not prohibited under this Court’s opinion in *Carson Ready Mix*.

The other case cited by the Coroner—*State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 370 P.2d 672 (1962)—also does not support the argument that the Review-Journal’s appendix materials should be stricken. In that case (which, unlike this matter was a writ proceeding rather than a direct appeal), this Court struck an improper affidavit submitted by the respondent (who was a judge with the Second Judicial District Court) that criticized petitioner’s counsel and the merits of the petition. *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962). Here, in contrast, as detailed above, the Review-Journal is providing the Court with judicially noticeable information that is “necessary to rebut appellant’s position on appeal.” Nev. R. App. P. 30(b)(4). Accordingly, the Court should deny the Coroner’s request to strike the Review-Journal’s Appendix.

E. The Court Should Deny the Coroner’s Request for a Stay of the Briefing Schedule.

At the end of its Motion, the Coroner requests that this Court stay the briefing and extend the October 8, 2018 deadline for the Coroner’s Reply pending resolution of the Motion. (Mot., p. 3.) Such a request is unnecessary. By the Coroner’s own admission, the portions of the Review-Journal’s Answering Brief that it has asked this Court to strike are minimal—specifically, pages 18, 19, and 52 of the Answering Brief. (Mot., p. 2.) Given that the complained-of portions of the Answering Brief are so minimal, the Coroner can still prepare a Reply Brief that addresses the substantive arguments of the Review-Journal’s Answering Brief without further delaying the

Court's resolution of this appeal.

III. CONCLUSION

For these reasons, this Court should deny the Coroner's Motion to Strike and Motion to Stay Briefing.

DATED this the 21st day of September, 2018.

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931

Alina M. Shell, Nevada Bar No. 11711

MCLETCHIE SHELL LLC

701 East Bridger Ave., Suite 520

Las Vegas, Nevada 89101

Counsel for Respondent, Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing OPPOSITION TO MOTION TO STRIKE RESPONDENT’S APPENDIX AND MOTION TO STAY BRIEFING was filed electronically with the Nevada Supreme Court on the 21st day of September, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson and Laura Rehfeldt
Clark County District Attorney’s Office

Micah S. Echols
Marquis Aurbach Coffing

*Counsel for Appellant,
Clark County Office of the Coroner/Medical Examiner*

/s/ Pharan Burchfield
Employee of McLetchie Shell LLC