

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE
CORONER/MEDICAL EXAMINER,

Appellant,

vs.

LAS VEGAS REVIEW-JOURNAL,

Respondent.

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SUPREME COURT CASE NO:
74604

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

RESPONDENT'S REPLY TO OPPOSITION FOR LEAVE TO FILE
SURREPLY

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I. INTRODUCTION

This Court should permit the Surreply proposed by Las Vegas Review-Journal, Inc. (the “Review-Journal”). Doing so is necessary for two reasons. First, *Clark County School District v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313 (Oct. 25, 2018) (“*CCSD*”) was decided after the Review-Journal submitted its Answering Brief. Not allowing the Review-Journal to address the Coroner’s new arguments based on *CCSD*—raised for the first time by the Coroner in its Reply—would be unjust. Second, the Surreply is necessary to address factual inaccuracies in the Coroner’s Reply. While the Coroner argues that the issues surrounding those facts are new, they are not—the Review-Journal argued that producing autopsy reports would benefit the public in its Answering Brief. Moreover, the Court does not benefit from having factual misstatements stand.

This Court has the authority to allow the Surreply to address these two issues, neither of which can be adequately addressed in a notice of supplemental authority.

II. ARGUMENT

A. The Review-Journal Will Be Prejudiced If It Is Not Permitted to Respond to the Coroner’s Arguments Regarding *CCSD*.

In its Reply Brief, the Coroner applies the two-part balancing test this Court adopted in *CCSD* to the facts of the instant case (Reply, pp. 28-30), arguing that it met its burden of establishing a nontrivial personal privacy interest in the records,

and asking this Court to remand this matter to the district court “to determine whether LVRJ can meet its burden to demonstrate an overriding public interest to overcome the privacy of personal health information.” (*Id.*, p. 30.) The Court issued its opinion in *CCSD* after the Review-Journal filed its Answering Brief. The Review-Journal therefore did not have the opportunity to address the application of the new *CCSD* balancing test to the facts of this case. Thus, the Review-Journal should be granted leave to respond to the Coroner’s specific factual and legal arguments.

The Coroner argues that the Review-Journal should simply have filed a notice of supplemental authorities pursuant NRAP 31(e). (Opp., pp. 3-4.) This ignores that NRAP 31(e) specifically prohibits parties from making any legal arguments in a notice of supplemental authorities. NRAP 31(e) (“The notice shall . . . state concisely and *without argument* the legal proposition for which each supplemental authority is cited.”) (emphasis added). A notice of supplemental authorities would not permit the Review-Journal to address the Coroner’s new legal arguments that it has met its burden under the *CCSD* test and that the Review-Journal now bears the burden of demonstrating that the public interest it seeks to advance is significant and that the information sought is likely to advance that interest.¹ Nor could such a notice address

¹ The Coroner also inaccurately argues that the Review-Journal “essentially argues [in its proposed Surreply] that the privacy interest balancing test recently established by this Court does not apply....” (Opp., p. 3.) This is inaccurate. What the Review-Journal actually argues in its proposed Surreply is that remand to the district court for consideration of the *CCSD* test is improper here because *when the CCSD test is*

the factual errors detailed below.

B. This Court Should Allow the Review-Journal to Correct the Record.

To avoid correction of its errors regarding Colorado autopsies, the Coroner asserts that the Review-Journal's proposed surreply "raises new issues on behalf of the amicus curiae," and that doing so is "prohibited." (Opposition, p. 2 (citing *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230, n.2 (10th Cir. 2000)).) Contrary to the Coroner's argument, in *Wyoming Farm Bureau Federation*, the Tenth Circuit in fact recognized that it has the discretion to consider arguments raised solely by amici in "exceptional circumstances." *Wyoming Farm Bureau Federation*, 199 F.3d at 1230, n.2 (citation omitted).

However, the arguments raised by Amici Curiae in this case are not new. The gravamen of Amici Curiae's argument in their brief is that public access to autopsy reports serves a critical function: "increas[ing] the public's understanding of childhood abuse, and enhanc[ing] the public's ability to assess the efficacy of government efforts to protect children from harm." (Brief of Amici Curiae, p. 7.) The Review-Journal made similar arguments. (Answering Brief, pp. 3-4; 20.)

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applied, the Coroner has not met (and cannot meet) its initial burden (Proposed Surreply, pp. 4-8), and the Review-Journal has already established the significant public interest furthered by access to juvenile autopsy reports. (*Id.*, p. 8.)

As an example of the value of public access to autopsy reports, Amici cited extensive investigative reporting by two Colorado news outlets in which access to—and reporting on—juvenile autopsy reports prompted state lawmakers to address issues with Colorado’s child welfare system. (Brief of Amici, p. 8.) In its Reply, the Coroner responded to Amici’s arguments, and specifically addressed Amici’s reference to the Colorado reporting. (Reply, pp. 37-38.) In doing so, the Coroner flatly (and inaccurately) argued that the Colorado news outlets did not obtain autopsy reports. (Reply, p. 37 (“Contrary to amici’s assertions, juvenile autopsy reports were not produced.”).) In order to address that misrepresentation (which goes directly to a central issue in this appeal), the Review-Journal should be allowed to file a Surreply.

This is not an effort to “step in[to] the shoes” of Amici (Opp., p. 2); the Review-Journal is providing the Court with accurate information to assist in its consideration of the issues raised in this important case.

C. This Court Has the Discretion to Permit the Surreply.

While NRAP 28 is silent about surreplies, “the court may—to expedite its decision or for other good cause—suspend any provision of [the NRAP] and order proceedings as the court directs.” NRAP 2. Good cause exists here because the Review-Journal will be prejudiced if it is not permitted to respond to the Coroner’s inaccurate factual assertions and its legal and factual assertions about the new *CCSD*

test. Moreover, NRAP 1(c) provides that the Rules of Appellate Procedure “shall be liberally construed to secure the proper and efficient administration of the business and affairs of the courts and to promote and facilitate the administration of justice by the courts.”

D. The Court Should Decline the Coroner’s Request for Leave to File a Response to the Review-Journal’s Surreply.

The Coroner argues that if the Court permits the Review-Journal to file its proposed Surreply, it should permit the Coroner to file a response. (Opp., p. 4.) This Court should decline that request. The Coroner has already had ample opportunity to assert its arguments regarding the alleged privacy interests at issue in this case in its Opening and Reply Briefs and has had ample opportunity to address the *CCSD* test. More importantly, the parties—and the public—have a strong interest in resolving the important issues in this case as expeditiously as possible, and additional briefing would only further delay resolutions of those issues.

III. CONCLUSION

This Court should grant leave to file the proposed Surreply.

DATED this 24th day of January, 2019 .

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S REPLY TO OPPOSITION FOR LEAVE TO FILE SURREPLY was filed electronically with the Nevada Supreme Court on the 24th day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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