IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Case No.: 74604 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

APPELLANT'S RESPONSE TO SUR-REPLY

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TABLES OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

I. INTRODUCTION

In its sur-reply, LVRJ raises two issues: (1) First, LVRJ attempts to rehabilitate some of the misplaced newspaper articles referenced in the amici brief; and (2) Second, LVRJ argues that the Coroner has not satisfied the new balancing test outlined in *CCSD v. LVRJ*, 429 P.3d 313 (Nev. 2018) for a remand proceeding, if necessary. Yet, there is no authority that permits LVRJ to file a reply in support of the amici brief, particularly because the amici brief attempts to raise new issues for the first time on appeal. *See* NRAP 29(g). Thus, LVRJ's first sur-reply issue has gone so far afield that it should not even be considered by this Court. Even if this Court were to consider LVRJ's first sur-reply issue, it is imperative that this Court recognize that of the 72 cases that were investigated and reported in the *Denver Post*, only five cases include autopsy reports. Yet, there is no evidence that any of these five autopsy reports were obtained by public records request. Thus, LVRJ's first sur-reply issue is inapposite to the issues presented in this appeal.

Second, the Coroner has met its burden of establishing a nontrivial privacy interest in relation to the juvenile autopsy reports in accordance with this Court's recent opinion in *CCSD v. LVRJ*. In its sur-reply, LVRJ argues that privacy interests are personal, and, therefore, a decedent has no privacy interests upon death. *Cf.* NRS 239.0115(1) (creating a rebuttable presumption for access to records otherwise declared confidential ***after 30 years***). Aside from

NRS 239.0115(1), common law also explicitly recognizes a family member's privacy interest in relation to a decedent. This is especially true of juveniles, who never reached the age of majority. Therefore, if the Court reaches the redaction issues relevant to *CCSD v. LVRJ*, the Court should remand this issue to the District Court with instructions for LVRJ to demonstrate an overriding public interest.

II. LEGAL ARGUMENT

A. THE FIVE AUTOPSY REPORTS OBTAINED BY THE *DENVER POST* ARE NOT RELEVANT, AND THERE IS NO EVIDENCE THAT THE AUTOPSY REPORTS WERE OBTAINED THROUGH PUBLIC RECORDS REQUESTS.

LVRJ's sur-reply brief impermissibly raises new issues on behalf of the amici curiae for the first time on appeal, which is prohibited. *See Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). LVRJ complains that the Coroner inaccurately represented that the *Denver Post* and Denver televisions stations did not receive juvenile autopsy reports. *See* Sur-reply at 2–3. The Coroner, however, merely referenced the article that the amici brief relied upon. *See* Reply Brief at 37–38. Indeed, the article referenced in the amici brief makes no mention of juvenile autopsy reports, as the Coroner pointed out in its reply brief. 1 Appellant's Reply Appendix 5–33.

Rather than direct this Court to the Appellant's Reply Appendix that included the articles referenced in the amici brief, LVRJ points the Court to a

website not contained within the amici brief. *See* Sur-reply at 3. LVRJ acknowledges that only five autopsy reports, of a total of 72 cases, were obtained by the *Denver Post*. It is quite telling that the *Denver Post* did not obtain autopsy reports for all 72 cases that it investigated. Furthermore, LVRJ has not cited to any fact that demonstrates the five juvenile autopsy reports were obtained directly from a government entity pursuant to a public records request. For example, it would not be surprising that the grieving mother of Stonie Bridgeo, one of the cases that included an autopsy report, gave the *Denver Post* a copy of the autopsy report. This is especially true considering the fact that the mother indicated that she intends to write a book on her son's death. *See* http://childfatalities.denverpost.com/#id=4&name=BridgeoStonie. LVRJ simply ignores the fact that there is no evidence that the five juvenile autopsy reports disclosed, of the 72 cases, were obtained through a public records request. *Cf. Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 378 (Colo. Ct. App. 2000) (affirming the nondisclosure of juvenile autopsy reports because disclosure would cause substantial injury to the public interest). As the Coroner previously articulated, it can release the juvenile autopsy reports upon a waiver of the next of kin. This is consistent with Nevada law, and in particular, NRS 259.045; 1 JA 18–19; AB 57 (1 JA 236–237). Since there is no evidence that a limited number of autopsy

reports were obtained from the government entity as public records, this Court should not lend any weight to LVRJ's sur-reply argument.

B. THE CORONER HAS ESTABLISHED THE EXISTENCE OF NONTRIVIAL PRIVACY INTERESTS IN RELATION TO THE JUVENILE AUTOPSY REPORTS.

LVRJ asserts that the Coroner has not met its burden under the new balancing test established by this Court in *CCSD v. LVRJ*. Specifically, LVRJ contends that privacy interests are personal and cannot be asserted by third parties. *See* Sur-reply at 6. Of the string of citations LVRJ relies on in support of its argument, only one case concerns privacy interests in relation to a deceased person. *Id.* at 6–7. In *Loft v. Fuller*, 408 So.2d 619, 623 (Fla. App. 1981), the court determined that the decedent's relatives could not maintain a cause of action for invasion of privacy in accordance with Florida law. The *Loft* court, however, recognized that such a rule could not be absolute, and certain circumstances could exist to warrant an invasion of privacy claim to proceed. *Id.* Indeed, the court concluded:

> There are cases which support the view that under certain circumstances the deceased's relatives may recover for the invasion of their own privacy interests even though they were not personally the focus of the publicity in question. For example, see *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (Ky. App. 1912); *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932); *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987, 89 S.Ct. 1465, 22 L.Ed.2d 762 (1969); *Cox*

> *Broadcasting Corp. v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973), *reversed on other grounds*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The rationale behind these decisions is that the relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication.

Id. It is also important to note that the *Loft* decision predated the United States Supreme Court ruling in *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004).

LVRJ attempts to distinguish the cases relied upon by the Coroner by claiming that the cases pertain to images and not autopsy reports. *See* Sur-reply at 7–8. The basic premise established in the *March*[1] and *Favish* cases is that surviving family members have a privacy interest with respect to the deceased. LVRJ also alleges that *Favish* is not applicable because it concerned the application of Exemption 7 to the Freedom of Information Act. *Id.* at 7. Yet, the Ninth Circuit, including the *Cameranesi* court, have relied upon the *Favish* case to define what constitutes a nontrivial privacy interest. *Cameranesi v. U.S. Dep't. of Defense*, 856 F.3d 626, 638 n.16 (9th Cir. 2017) (citation omitted). Thus, the Coroner's reliance on *Favish* is appropriate.

[1] *March v. Cnty. of San Diego*, 680 F.3d 1148 (9th Cir. 2012).

Under *CCSD*, the Coroner need only demonstrate that a nontrivial privacy interest exists. *See CCSD v. LVRJ*, 429 P.3d 313, 320 (Nev. 2018). In other words, the Coroner must show that the interest is more than *de minimis*. *See Cameranesi*, 856 at 638 ("[A] disclosure implicates personal privacy if it affects either the individual's control of information concerning his or her person or constitutes a public intrusion long deemed impermissible under the common law and in our cultural traditions." *Id.* (citations and internal quotation marks omitted). "Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions." *Id.* (citations omitted).

In its reply brief, the Coroner directed this Court to California law that recognizes a common law tort of invasion of privacy related to a decedent. *See* Reply at 29–30 (citing *Catsouras v. Dep't of Cal. Hwy. Patrol*, 181 Cal.App.4th 856, 874, 104 Cal.Rptr.3d 352, 366 (2010) (recognizing a decedent's family member's right to assert an invasion of privacy claim)). LVRJ's sur-reply failed to address the application of this authority. Indeed, Nevada initially adopted the common law invasion of privacy tort from California. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (identifying the elements for a tort of invasion of privacy and relying on *Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608

P.2d 716 (1980)). Accordingly, as argued in the Coroner's briefs, the surviving family members retain a privacy interest in the decedent's autopsy report, including the decedent's personal health information. The burden now shifts to LVRJ to demonstrate that the public interest sought to be advanced is significant and that the information sought is likely to advance that interest. *CCSD*, 429 P.3d at 320. Therefore, if the Court reaches the CCSD issue, the Court should make the determination that the Coroner has, in fact, satisfied its initial burden, such that the burden is shifted to LVRJ for a remand proceeding, if necessary.

III. CONCLUSION

LVRJ's arguments on behalf of the amici curiae within its sur-reply brief should be disregarded. First, LVRJ cannot step in the shoes of the amici curiae. More importantly, however, the *Denver Post* only obtained five juvenile autopsy reports out of the 72 cases it investigated. And, there is no evidence that the *Denver Post* obtained any of these five autopsy reports directly from a government entity, as a public record, rather than through a third party, such as the next of kin.

Furthermore, the Coroner has met its burden of establishing nontrivial privacy interest in relation to the juvenile autopsy reports in accordance with this Court's recent opinion in *CCSD v. LVRJ*. LVRJ's position that a decedent's privacy rights disappear upon death is simply unsupportable.

Accordingly, this Court should determine that the Coroner has established that any disclosure of the juvenile autopsy reports implicates nontrivial privacy interests. In the remand proceedings, if necessary, this Court should instruct the District Court to order LVRJ to demonstrate that the significant public interest is being sought, and that disclosure of the decedents' confidential health and medical information will advance that interest.

Dated this 7th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of this Court's February 11, 2019 Order Regarding Motion because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ proportionally spaced, has a typeface of 14 points or more and contains ___ words; or

☒ does not exceed 9 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S RESPONSE TO SUR-REPLY** was filed electronically with the Nevada Supreme Court on the 7th day of March, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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