IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 75073

THE LAS VEGAS REVIEW-JOURNAL AND THE ASSOCIATED PRESS,

Petitioners

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE

Respondents,

And

VERONICA HARTFIELD, A NEVADA RESIDENT AND THE ESTATE OF CHARLESTON HARFIELD and OFFICE OF THE CLARK COUNTY CORONER/MEDICAL EXAMINER

Real Parties in Interest.

PETITION FOR REHEARING

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I. Points of Law or Fact that Petitioner Believes the Court has Overlooked or Misapprehended

Ms. Hartfield respectfully disagrees with the position taken by the Court regarding the amount of reliance on the case of *Katz v. National Archives & Records Administration*, 862 F.Supp. 476 (D.D.C 1994) in its analysis for determining whether injunctive relief was appropriate, and submits that *Katz* was only one of several cases the district court found helpful in determining that a balancing test was appropriate. In fact, Nevada case law and case law from other jurisdictions demonstrate that in the type of situation where there are competing fundamental interests, a balancing test should be conducted.

The specific question before the district court was whether an injunction was appropriate. The Nevada Supreme Court has clearly stated that the purpose of the Nevada Public Records Act is to ensure accountability of the government to the public by facilitating public access to "vital information" about governmental activities. *See DR Partners v. Bd. Of Cnty Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (Nev. 2000). Where there is no statute that provides an absolute privilege against disclosure, a balancing test must be conducted. *Id.* (references to citations omitted).

The district court also relied on the *Johnson* case, cited by the Media Parties, in the district court pleadings; the district court's order specifically states:

> THE COURT FURTHER FINDS compelling, the *Johnson* case, cited by Defendants, which acknowledges that under certain circumstances, a gag order may be appropriate, **and a balancing**

test is necessary. *See Johanson v. Eighth Judicial Dist. Court of State Of Nev. ex. Rel. Cty. Of Clark*, 124 Nev. 245, 251, 182 P.2d 94, 98 (Nev. 2008).

(III PA 356-363).

The district court relied on other cases as well:

THE COURT FURTHER FINDS that *Johanson* contemplates a balancing approach in determining whether the press' access to the redacted Hartfield report may be restrained;

THE COURT FURTHER FINDS that it agrees with the approach taken by the Eighth Circuit in *Certain Interested Individuals, John Does I-V, Who are Employees of McDonnell Douglas Corp. v. Pulitzer Pub. Co.*, 895 F.2d 460 (8th Cir. 1990), where the Eighth Circuit Court of Appeals stated, "We agree with the district court that what is required is a careful balancing of the public's interest in access against the individual's privacy interests, and we commend the district court for its efforts to protect and accommodate the conflicting interests in access and privacy." *Certain Interested Individuals, John Does I-V, Who are Employees of McDonnell Douglas Corp. v. Pulitzer Pub. Co.*, 895 F.2d 460, 464 (8th Cir. 1990);

THE COURT FURTHER FINDS that, based on the cited cases, a balancing test is required in this case;

(III PA 356-363).

The district court also cited to *Katz* for the proposition that:

Family members of decedents have a privacy right in records regarding their deceased relatives. *Katz v. National Archives & Records Admin.*, 862 F.Supp. 476 (D.D.C. 1994). In *Katz,* the court held:

[T]he Kennedy family has a clear privacy interest in preventing the disclosure of both the x-rays and the optical photographs taken during President Kennedy's autopsy...However, there can be no mistaking that the Kennedy family has been traumatized by the prior

> publication of the unauthorized records and that further release of the autopsy materials will cause additional anguish...

(III PA 356-363).

The *Katz* court acknowledged that "likewise, the Archives does not dispute that there is a public interest in the original autopsy photographs. The disagreement lies in **how the Court should determine the balancing test**." *Katz*, 862 F.Supp. at 483 (emphasis added).

As such, the district court found compelling the language in *Katz*:

> ...The Court finds that allowing access to the autopsy photographs would constitute a clearly unwarranted invasion of the Kennedy family's privacy. *Katz*, 862 F.Supp. at 485-86.

(III PA 356-363).

Based on these cases, and *Katz*, which the district court did rely on in determining that a balancing test was appropriate, the district court utilized a balancing test and conducted its analysis. (III PA 356-363). As such, it is a misapprehension of the analysis the district court conducted in stating that the injunction order relied on *Katz* in the issuance of the order when the district court utilized a number of cases, which all reached the same conclusion that a balancing test should be conducted under the circumstances set forth before the court. Even the cases cited to by the Media Parties supported this conclusion. (III PA 356-363).

The district court was limited in its order to the parties before it, which were the Media Parties and the Coroner's office and the issue before it, which was

balancing the privacy interests versus the rights of the Media Parties in determining whether an injunction should issue. After conducting the balancing test, the district court found that the Media Parties failed to articulate any legitimate basis whatsoever for continued possession, dissemination and/or publication of Mr. Hartfield's redacted autopsy report and as such, the district court ordered it be returned to Ms. Hartfield or destroyed. (III PA 356-363). The district court could not extend beyond its jurisdictional reach but was convinced by the argument set forth by Ms. Hartfield that the Media Parties' continued dissemination, and/or publication of Mr. Hartfield's redacted autopsy report would cause her additional pain and anguish. (III PA 356-363). Additionally, the district court found irreparable harm in the Media Parties' continued reporting on Mr. Hartfield's private autopsy records as such reporting was an invasion of the Hartfield Parties' fundamental right to privacy. (III PA 356-363). It was based on this analysis that the district court restrained the parties included in the action from continuing to report on the same and this point appears to have been overlooked by this Court. (III PA 356-363).

It is also a misapprehension to state that the district court placed the burden on the Media Parties. As stated above, the district court found two competing fundamental rights and balanced them. The right to privacy is a fundamental right guaranteed by the Constitution and in fact, is a right older than the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965).

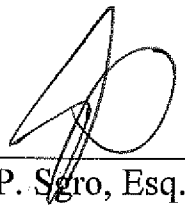
After asserting her fundamental right to privacy, the district court found that Ms. Hartfield's fundamental right to privacy outweighed the Media Parties' interest because the Media Parties could not articulate a single legitimate basis for why they should be entitled to retain documents that served no public purpose. (III PA 356-363).

Finally, it is a misapprehension to state that "any damage to the Hartfields' privacy interests had already been done," and is contrary to what the record set forth below. The district court found that the anguish suffered by Ms. Hartfield by having her husband's report disseminated and/or published was an invasion of her fundamental right to privacy, constituting serious and irreparable harm. (III PA 356-363). Moreover, the district court found that the Media Parties' access to Mr. Hartfield's redacted autopsy report was a dissemination of highly intimate and utterly invasive information of a person's life and this is in connection with a horrific event. (III PA 356-363).

The district court made those findings, in part, from the affidavit Ms. Hartfield signed attesting that the continued reporting is jeopardizing her fundamental right to privacy and this was included in the record below. (II PA 301-303). Ms. Hartfield signed an affidavit that because her privacy right is being violated, she wants the redacted autopsy report of her husband out of the hands of Petitioners. (II PA 301-

303, III PA 356-363). Because the record in fact demonstrates that continued possession, dissemination and/or publication would cause further damage to Ms. Hartfield, it was a misapprehension for this Court to state the damage was already done.

Dated this 5 day of March, 2018.



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CERTIFICATE OF COMPLIANCE

I hereby certify 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 Office Word in size 14 font in double spaced Times New Roman.

I further certify I have read this brief and that it complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 1293 words.

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Finally, I hereby certify to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand 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 5 day of March, 2018.

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CERTIFICATE OF SERVICE

I certify and affirm that I am an employee of Sgro & Roger and that on this 5th day of March, 2018 the **PETITION FOR REHEARING** was served by First Class United States Mail, postage fully prepaid to the following:

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