

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

12-23-2021

**Las Vegas Review-Journal v. City of Henderson, 137 Nev. Adv. Op.
(Dec. 23, 2021)**

Kaitlin McCormick-Huhn

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Las Vegas Review-Journal v. City of Henderson, 137 Nev. Adv. Op. (Dec. 23, 2021)¹

CIVIL LAW: PUBLIC RECORDS, PREVAILING PARTY, AND ATTORNEY FEES

SUMMARY

District courts must apply the catalyst theory to determine whether a party prevails in litigation related to public records. A district court abuses its discretion when it fails to consider all five factors under *Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020) (“CIR” factors). Courts must make proper findings for each of the five factors and balance the factors to determine whether a party prevailed.

FACTUAL AND PROCEDURAL BACKGROUND

Las Vegas Review-Journal (“LVRJ”) and the city of Henderson (“Henderson”) were engaged in a dispute that came before the Nevada Supreme Court twice before this suit. LVRJ, pursuant to the Nevada Public Records Act (NPRa), requested documents from Henderson related to its use of a public relations firm. Henderson searched its records and determined that approximately 70,000 pages of documents were implicated in LVRJ’s request. Before it would produce the documents, Henderson wanted the costs associated with reviewing the documents for privileges and confidentiality to be covered by LVRJ. Further, Henderson would not begin the process of reviewing the documents until half of the cost was paid.

LVRJ sought mandamus relief from the district court to compel production of the documents without having to pay the privilege-review fee. Meanwhile, Henderson permitted LVRJ to begin review of non-privileged documents, and it also provided LVRJ with a privilege log. Ultimately, the district court held that Henderson was properly complying with the NPRa. LVRJ appealed to the Nevada Supreme Court arguing that the privilege log was insufficient, and that it was unclear if documents were withheld because they were protected under attorney-client privilege, work product privilege, or the deliberative-process privilege. The Nevada Supreme Court found that the district court did not appropriately analyze the deliberative-process-privileged documents. Before the district court could re-analyze the matter on remand, Henderson voluntarily disclosed documents it withheld under the deliberative-process privilege.

Meanwhile, the district court granted LVRJ attorney fees because it reasoned that LVRJ was the prevailing party, due to it accessing the records from Henderson. This matter was also appealed, and the Nevada Supreme Court held that LVRJ was not the prevailing party, as the matter had been remanded back to the district court, and the high court had denied LVRJ’s claims (other than the deliberative-process issue). The Nevada Supreme Court reversed LVRJ’s award of attorney fees.

¹ By Kaitlin McCormick-Huhn.

Then, the Nevada Supreme Court issued an opinion that “conclude[d] that whether a party prevails and may recover attorney fees in a public records matter that has not proceeded to final judgement is determined by the catalyst theory.”²

Thus, LVRJ amended its request for attorney fees, arguing it was the prevailing party under the catalyst theory. The district court denied the motion, and LVRJ appealed.

DISCUSSION

As a preliminary matter, the Nevada Supreme Court “concluded the law-of-the-case doctrine limited the scope of attorney fees for which LVRJ could seek recovery,” which meant fees could only be awarded as to the efforts to obtain the documents withheld as deliberative-process-privilege documents.

The district court abused its discretion in its catalyst-theory analysis

To determine whether a party prevails in litigation related to public records, courts must apply the catalyst theory.³ “Under the catalyst theory, a requester prevails when its public record suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits.”⁴ The catalyst theory requires the evaluation of five factors.⁵ The Nevada Supreme Court “clarif[ied] that consideration of these factors [was] mandatory.” Specific findings as to each of the factors are encouraged; at a minimum, the record must demonstrate consideration of each factor by the district court.

The Nevada Supreme Court concluded “that the district court abused its discretion in its catalyst-theory analysis, as the court misconstrued the fifth *CIR* factor and neglected to show that it appropriately considered several other factors.” The fifth factor is as follows: “whether the requester reasonably attempted to settle.”⁶ Below, the district court had focused its analysis of the fifth factor on *Henderson’s* attempts to settle. The Nevada Supreme Court reasoned that the district court failed to analyze the lack of attempts to settle made by the requester, LVRJ, and therefore misconstrued the purpose of the catalyst-theory analysis. The Nevada Supreme Court concluded that the district court’s action of misconstruing the fifth *CIR* factor made it unclear whether the litigation triggered the deliberative-process-privilege documents’ release, and whether the litigation was frivolous under the second and fourth *CIR* factors. The Nevada Supreme Court further declined to hold, as LVRJ suggested it should, that the fifth factor should carry less weight in the *CIR* factor test.

² Las Vegas Metro. Police Dep’t v. Ctr. for Investigative Reporting, Inc., 136 Nev. 122, 460 P.3d 952 (2020).

³ *Center for Investigative Reporting, Inc.*, 136 Nev. at 127–28.

⁴ *Id.* at 128.

⁵ The factors are as follows: “(1) when the documents were released, (2) what actually triggered the documents’ release, . . . (3) whether [the requester] was entitled to the documents at an earlier time. Additionally, the district court should take into consideration [4] whether the litigation was frivolous, unreasonable, or groundless, and [5] whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. *Id.*

⁶ *Id.*

In addition, this Court found the district court misapplied *CIR* when it failed to make sufficient findings for the second, third, and fourth factors, and when it failed to balance the factors. The district court stated the second and third factors and the parties' positions, but it failed to consider specific facts related to these factors. Thus, the Nevada Supreme Court concluded the district court's opinion lacked guidance on whether or how the factors were balanced to support the conclusion that LVRJ was not a prevailing party.

Specific to the second factor, the district court needed to determine whether there was a "causal nexus" such that the litigation caused Henderson to disclose the deliberative-process-privilege documents.⁷ For the third factor, the district court needed to rule on the merits of Henderson's claim that the documents were in fact protected under deliberative-process privilege to determine if LVRJ was entitled to the documents earlier in time.

The district court made findings on the fourth factor, but its reasoning was clearly erroneous. The district court erroneously reasoned the suit was not frivolous because the Nevada Supreme Court was silent on whether the suit was frivolous when it came before the Court previously. The Court rejected this reasoning, explaining that frivolousness of the suit was not at issue before it. Therefore, the district court also failed to enter findings on the fourth *CIR* factor.

CONCLUSION

In sum, the Court held that "the district court abused its discretion by failing to show that it appropriately considered and weighed the *CIR* factors in reaching its conclusion. Therefore, the district court's order is reversed." The Court remanded the suit to the district court to analyze the catalyst-theory factors, to make proper findings as to the deliberative-process-privilege documents, and to balance the factors to determine whether LVRJ's litigation was the catalyst and thus, whether LVRJ is the prevailing party regarding those documents. The Court also affirmed the district court's order pertaining to the documents protected by the other privileges.

⁷ *Id.*