



A Review of Prior Restraints and Restraining Media Coverage of the Las Vegas Shooting

BY THERESE SHANKS, ESQ.

On October 1, 2017, Las Vegas changed forever when a lone gunman took 58 innocent lives in what is now largest mass shooting in American history. In the subsequent coverage, media outlets obtained, released and reported on redacted autopsy reports of the victims. Veronica Hatfield, the wife of one of the victims, briefly obtained an injunction from the Eighth Judicial District Court prohibiting the *Las Vegas Review-Journal* and the Associated Press from reporting on her deceased husband's redacted autopsy report. However, on February 27, 2018, the Nevada Supreme Court struck down the injunction as an unconstitutional prior restraint on freedom of the press. *Las Vegas Review-Journal v. Eighth Judicial District Court*, 134 Nev., Adv. Op. 7, 412 P.3d 23 (2018).

“For Your Information, the Supreme Court Has Roundly Rejected Prior Restraint”¹

Prior restraints on the press are presumptively unconstitutional. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968). The First Amendment of the U.S. Constitution and Article 1, Section 10 of the Nevada Constitution prohibit the passage of any law that restrains the freedom of the press. The U.S. Supreme Court has consistently interpreted the First Amendment as protecting against orders that prohibit dissemination of information by the press. *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

In *Nebraska Press Ass'n v. Stuart*, the U.S. Supreme Court struck down an injunction prohibiting the press from reporting on the arraignment proceedings (and evidence divulged during those proceedings) of a man indicted for the mass murder of a family of six in a small town in Nebraska. 427 U.S. 539, 570 (1979). The Supreme Court explained that “prior restraints on speech and publication are the

most serious and least tolerable infringement on First Amendment rights” because they operate as an “immediate and irreversible sanction” without the full “panoply of protections” afforded by the judicial process. *Id.* at 559. The court also explained the significance of media covering alleged criminal activity: “The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial process to extensive public scrutiny and criticisms.” *Id.* at 560 (internal quotations omitted). Further, “We have learned, and continue to learn from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press.” *Id.* at 560-61 (internal quotations and alterations omitted).

continued on page 20

A Review of Prior Restraints and Restraining Media Coverage of the Las Vegas Shooting

The Nevada Supreme Court Leaves no Doubt that Prior Restraint Proponents Carry a Heavy Burden

Relying on the rationale in *Stuart*, the Nevada Supreme Court struck down the injunction prohibiting the *Las Vegas Review-Journal* and Associated Press from reporting on the redacted autopsy of Hartfield’s husband. *Las Vegas Review-Journal*, 412 P.3d at 28.

The *Las Vegas Review-Journal* and Associated Press, along with other media outlets, petitioned the Clark County Coroner for access to the victims’ autopsy reports under Nevada’s Public Records Act shortly after the mass shooting in Las Vegas. *Id.* at 24. When the Clark County Coroner refused to release the autopsy reports, the *Review-Journal* filed a lawsuit seeking their disclosure. *Id.* On January 30, 2018, the district court judge ruled that the autopsy reports must be released, but that the victims’ names and personal identifying information must be redacted. The coroner released the redacted autopsy reports on January 31, 2018, and the media—including the *Las Vegas Review-Journal*, the Associated Press, Fox News and Huffington Post—all reported on the redacted autopsy reports within 48 hours of their release. *Id.* at 24-25.

Two days after the coroner publicly released the autopsy reports, and 24 hours after the last public report, Hartfield filed her lawsuit and sought to enjoin the *Las Vegas Review-Journal* and Associated Press from reporting on her husband’s redacted autopsy. *Id.* at 25. She argued that her family’s need for privacy outweighed any reason the media had for reporting this information. *Id.* at 26. The district court agreed and entered an injunction prohibiting the *Las Vegas Review-Journal* and

Associated Press from “disclosing, disseminating, publishing or sharing the redacted autopsy report of Mr. Hartfield” *Id.*

After the *Review-Journal* and Associated Press filed an emergency writ petition, the Nevada Supreme Court reversed the district court’s order, because it found that the injunction was an invalid prior restraint. *Id.* at 28. As the Nevada Supreme Court explained, a prior restraint is constitutional only if:

1. The interest protected is “of the highest order,”
2. The restraint is “the narrowest available to protect that interest,” and
3. The harm sought to be prevented “cannot be mitigated by less intrusive measures.” *Id.* (internal quotations omitted).

The Reporters Committee for Freedom of the Press and The Nevada Press Association filed a brief in amici to argue that any privacy interest in the autopsy reports was outweighed by the public’s interest in access to anonymous autopsy reports arising from national tragedies. *Brief of Amici Curiae the Reporters Committee for Freedom of the Press and the Nevada Press Association*, as Amici Curiae Supporting Petitioners, at 3, *Las Vegas Review-Journal v. Eighth Judicial Dist. Ct.*, 412 P.3d 23 (2018) (No. 75073). According to the amicus parties, redacted autopsy reports are regularly used to “ensure the medical examiner’s findings match the account told by public officials,”



ANNOUNCING THE
MERGER OF:

LJSG LEACH JOHNSON
SONG & GRUCHOW

&

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

LKG LEACH | KERN | GRUCHOW
ANDERSON | SONG

TOGETHER.

*Delivering extraordinary
legal services throughout Nevada*

Two locations serving Nevada:

NORTHERN LOCATION:
5421 Kietzke Lane, Suite 200
Reno, NV 89511

SOUTHERN LOCATION – NEW OFFICE:
2525 Box Canyon Drive
Las Vegas, NV 89128

www.lkglawfirm.com



“help experts and officials spot trends” in criminal activity and to “inform the way government officials and the public [should] respond to future incidents of mass shootings.” *Id.* at 4-6. Knowing the exact cause of a victim’s death (i.e., gunshot wound, trampling or failure to receive immediate emergency attention), is informative to officials as they attempt to put into place protocols for responding to reports of mass shootings. *Id.* at 6.

The Nevada Supreme Court did not address the amicus parties’ concerns, because it found that any privacy interest the Hartfields may have had in the redacted autopsy reports was “diminished ... beyond the point of after-the-fact injunctive review” due to the *Review-Journal’s* and Associated Press’ prior news reports. *Las Vegas Review-Journal*, 412 P.3d at 27. The Nevada Supreme Court relied on a long line of authority from the U.S. Supreme Court holding that the press cannot be enjoined or otherwise held liable for publication of information it validly obtained from the state, even if that information should otherwise have remained confidential. *See id.* Because the *Review-Journal* and the Associated Press obtained the autopsy reports from a court order in the prior case, they cannot be enjoined or held liable for subsequent publication of those reports.

Even if they could have been held liable, the Nevada Supreme Court found that the injunction would still not accomplish the stated goal of protecting Hartfield’s privacy interests. The district court’s order only restrained the *Review-Journal* and Associated Press; it did not enjoin the many other media outlets who were also in possession of the autopsy reports and had publicly reported on them. *Id.* at 27-28. Therefore, the Nevada Supreme Court found the injunction to be

continued on page 22



LEGAL EXPERTISE
in

QDRO Drafting & Litigation™

Reduce your MALPRACTICE
Liability by referring your clients
directly to our law firm.

CONTACT: Raymond S. Dietrich, Limited

Las Vegas, Nevada
702.933.5709
www.galleongroup.net

Professional Liability Insurance Is
OUR BUSINESS.

Don't Let It Be Your Problem.

→ We handle all your
Business Insurance Coverages:

- Professional Liability Insurance
- Errors & Omissions
- Employment Practices Liability Insurance
- Directors and Officers
- Workers Compensation
- Comprehensive General Liability Insurance
- Excess and Umbrella Liability



Contact us for your free, no obligation quote

Monica Plaxton Garin, Esq.
9900 Covington Cross Dr., Suite 120 ♦ Las Vegas, NV 89144
702.375.7448 ♦ 702.382.1512 fax

www.charlestoninsurancegroup.com

Local roots. National reach.

With more than 650 lawyers in 15 offices, Ballard Spahr combines the depth and experience of a national firm with portfolio practices focused on the needs of the Nevada market.

- Commercial Litigation
- Consumer Financial Services
- Corporate and Real Estate Finance
- Media and Entertainment
- Mergers and Acquisitions
- Privacy and Data Security
- Public Finance
- Real Estate
- Resort, Hospitality, and Timeshare



Ballard Spahr
LLP

www.ballardspahr.com

Robert C. Kim
Las Vegas Office Managing Partner
702.868.7512 | kimr@ballardspahr.com

A Review of Prior Restraints and Restraining Media Coverage of the Las Vegas Shooting

an unconstitutional prior restraint. It simply did “not pass constitutional muster.” *Id.* at 28. The Nevada Supreme Court left no doubt that the proponent of a prior restraint “carries a heavy burden of showing justification for the imposition of such a restraint.” *See id.* at 26.

“All You Need’s a Strong Heart and a Nerve of Steel”²

Whatever the impact of the media’s dissemination of the autopsy reports, the fact remains that there are no words, spoken or unspoken, free or restrained, that can bring back the lives lost too soon. As we move forward to honor those who are gone, we will forever remain Vegas strong. **NL**

1. Quote from John Goodman in *The Big Lebowski* (Polygram Filmed Entertainment & Working Title Films 1998).
2. Quote from Elvis Presley in *Viva Las Vegas* (RCA Victor 1964).



THERESE SHANKS
practices in appellate law, business litigation, and estate and trust litigation at Robison, Sharp, Sullivan & Brust. She is the author of www.goinguplaw.com, an appellate law blog.