

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0682

COMMUNITY PRESS, LLC D/B/A CENTRAL CITY NEWS

VERSUS

CH2M HILL, INC.

Judgment Rendered: February 10, 2012

**Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C589971**

The Honorable Kay Bates, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

This matter is before us on appeal by plaintiff, Community Press, LLC d/b/a Central City News, from a judgment of the trial court granting a motion for summary judgment filed by defendant, CH2M Hill, Inc., and denying a cross-motion for summary judgment filed by Community Press. For the reasons that follow, we vacate the judgment of the trial court and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Community Press d/b/a Central City News (hereinafter “Central City News”) publishes a weekly community newspaper distributed in the City of Central, East Baton Rouge, Louisiana. CH2M Hill, Inc. (hereinafter “CH2M Hill”), a Florida corporation with its principal place of business in Colorado, but registered and authorized to do business in Louisiana, operates the City of Central Municipal Services Center pursuant to a comprehensive master agreement for the privatization of nearly all city services entered into by the City of Central and CH2M Hill. Thus, pursuant to the contractual agreement, CH2M Hill performs virtually all functions of the city government.

The City of Central has two full-time paid elected officials, the Mayor and the Chief of Police. The City of Central also has two full-time paid employees, the Executive Assistant to the Mayor and the Administrative Assistant to the Mayor. However, employees or subcontractors of CH2M Hill purportedly perform all other governmental functions for the City of Central pursuant to their agreement.

On March 27, 2010, municipal elections were held in the City of Central for the positions of Mayor, Chief of Police, and City Council. Before the election, on March 18, 2010, an advertisement entitled, “Setting the Record Straight,” appeared in the Central City News by “Friends of Jr. Shelton,” who was a

candidate for Mayor at the time. The advertisement purported to provide a comparison of the costs of building permit fees in the City of Central and in East Baton Rouge Parish. On March 26, 2010, the day before the elections were held, a four-page insert entitled, "We Are Central," appeared in the Advocate, a Baton Rouge daily newspaper also circulated in the City of Central. The fourth page of the insert was entitled, "Setting the record straight on fees," and purported to also provide a comparison between the costs of building permit fees in the City of Central and those of East Baton Rouge Parish. Although the sponsor of the advertisement is not directly identified, the following appears beneath this advertisement:

City of Central
Municipal Services Center
22801 Greenwell Springs Road, Suites 2 & 3
Central, LA 70739
225.262.5000

CH2M HILL

On March 31, 2010, the Editor of Central City News, Woody Jenkins, sent a public records request, pursuant to Louisiana's Public Records Law, to the City of Central, City Hall and CH2MHILL requesting:

A copy of all letters, emails, documents, invoices, statements, proposals, memos, faxes, audio recordings, video recordings, and any and all other material that may relate to the publication entitled "We are Central," which was published in the Advocate on Friday, March 26, 2010.

Mr. Jenkins further requested "a full accounting of how this publication came about, its origins, who influenced its content, the timing of its publication, the number of copies printed, and the cost of printing and insertion in the Advocate."

A similar request, also dated March 31, 2010, was also sent to CH2M Hill "c/o City of Central."

On April 6, 2010, Sheri M. Morris, "City Attorney" for the City of Central, responded to the public records request by informing Mr. Jenkins that "[t]here are

no public records which relate to the publication entitled ‘We are Central,’” and that the publication was prepared and paid for by CH2M Hill. Morris further informed Mr. Jenkins that his second request for “a full accounting of how this publication came about” did not constitute a request for public records as defined in LSA-R.S. 44:1, *et seq.*

On April 12, 2010, Mr. Jenkins, on behalf of Central City News, sent another public records request to CH2M Hill c/o City of Central specifically seeking to:

inspect all letters, emails, documents, proposals, memos, and faxes, that relate to the publication entitled, “We are Central,” which was published in the Advocate on Friday, March 26, 2010, which letters, emails, documents, proposals, memos, or faxes were to or from any of the following individuals:

<i>Mayor Mac Watts</i>	<i>David Barrow</i>	<i>Ralph Washington</i>
<i>Louis DeJohn</i>	<i>Lucky Ross</i>	<i>Aaron Moak</i>
<i>Joan Lansing</i>	<i>Wade Giles</i>	<i>Russell Starns</i>
<i>Tommy Higgs</i>	<i>Any account executive at the Advocate</i>	

Mr. Jenkins sent a similar request dated April 13, 2010, noting that the requested documents should be provided in accordance with Section 2.6 of the contract between the City of Central and CH2M Hill. In response, David A. Garrison, Senior Corporate Counsel for CH2M Hill, replied to Ms. Morris, counsel for Central City News, contending that the April 12 and 13, 2010 records requests were not made to a “public body,” pursuant to LSA-R.S. 44:1, as required by the Louisiana Public Records Law.

On April 26, 2010, Central City News filed a petition for writ of mandamus and declaratory judgment, seeking a judgment directing CH2M Hill to permit Central City News to examine the records sought in its public records request, declaring CH2M Hill a public body for purposes of Louisiana’s Public Record Law and awarding attorney’s fees and costs.

On May 27, 2010, CH2M Hill filed a motion for summary judgment seeking dismissal of the petition filed by Central City News, contending that CH2M Hill's private business records are not "public records" open to public scrutiny. In support of its motion for summary judgment, CH2M Hill submitted the affidavit of Grega St. John, the Agreement between the City of Central and CH2M Hill, the First Amendment to the Agreement, the Public Records Request Log, copies of the "We are Central" ads published in the Central City News March 11, 18, and 25, 2010, the "We are Central" four-page insert in the Advocate, public record requests from Mr. Jenkins, responses to the public record request, Central City News publications dated March 11, 18, 25, and April 1, 2010, and Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Volume 9.

On June 24, 2010, Central City News filed a cross-motion for summary judgment, seeking a judicial declaration that CH2M Hill is a "public body" under the Louisiana Public Records Law and that its records pertaining to the City of Central or its Agreement with the City of Central constitute public records. In support of its motion, Central City News submitted the affidavit of Mr. Jenkins, the Agreement between the City of Central and CH2M Hill, the First Amendment to the Agreement, the "Setting the Record Straight" ad by Jr. Shelton, the "We are Central" four-page ad insert, the public record requests by Mr. Jenkins, the responses to the public record requests, the City of Central Fiscal Year 2009-2010 General Fund Budget, Central City, LA website page, and Central City's General Requirements to Obtain a Residential Building Permit.

The motions for summary judgment were heard by the trial court on July 12, 2010, along with exceptions of unauthorized use of summary proceedings, no right of action, lack of standing, and failure to state a justiciable controversy filed by CH2M Hill. After taking the matters under advisement, on July 22, 2010, the

trial court rendered written reasons for judgment finding that CH2M Hill is not a “public body” within the meaning of Louisiana’s Public Record Law.¹ Accordingly, the trial court granted the motion for summary judgment filed by CH2M Hill and denied the motion for summary judgment filed by Central City News. On August 11, 2010, the trial court signed a judgment in accordance with its written reasons.² The exceptions brought by CH2M Hill were denied as moot.³

Central City News now appeals, contending that the trial court erred in granting CH2M Hill’s motion for summary judgment and in denying its cross-motion for summary judgment.⁴ In response to the appeal, CH2M Hill filed an answer to the appeal, seeking: (1) affirmance of the trial court’s judgment; (2) an award of attorney’s fees and expenses incurred in connection with defending this matter before the trial court to the extent the trial court is divested of jurisdiction

¹The court also concluded that the March 26, 2010 advertisement “We are Central,” was not placed by CH2M Hill in connection with its contract with the City of Central, but in its private capacity and for its own benefit. Thus, the court concluded, the records were not subject to examination by Central City News.

²On December 3, 2010, the trial court rendered a “Per Curi[a]m Opinion” further explaining its reasoning and purporting “to clarify any questions that may arise when the First Circuit Court of Appeals (sic) examines this matter.” However, review of a summary judgment, as in the instant case, is *de novo*, and courts of appeal are instructed to give no special weight to the findings of the trial court in such cases. See Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1035, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29.

³Although not contained in the record as initially lodged on appeal, CH2M Hill requested and was granted leave to supplement the record with its memorandum in support of exceptions as well as its memorandum in opposition to Central City News’ petition for writ of mandamus and declaratory judgment and in support of CH2M Hill’s motion for summary judgment with supporting exhibits.

⁴Central City News initially filed a notice of intention to file an application for supervisory writs with this court on August 25, 2010. On February 2, 2011, this court determined that that the trial court’s August 11, 2010 judgment was an appealable final judgment and granted Central City News’ writ application for the limited purpose of remanding the case to the district court with instructions to grant Central City News an appeal.

to render such award;⁵ and (3) an award of attorney's fees and expenses in connection with defending this matter on appeal.⁶

DISCUSSION

Summary Judgment

In the instant case, the trial court was presented with cross-motions for summary judgment. In the August 11, 2010 judgment, the trial court denied Central City News' motion for summary judgment, but granted CH2M Hill's motion for summary judgment. Although the denial of a motion for summary judgment is generally non-appealable, see LSA-C.C.P. art. 968, because the same issues lie at the heart of the cross-motions for summary judgment, review of the opposing motions is appropriate. See Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority, 2007-0107 (La. App. 1st Cir. 2/8/08), 984 So. 2d 72, 78, n.1.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Summary judgment is favored and "is designed to secure the just, speedy, and inexpensive determination of every action." LSA-C.C.P. art. 966(A)(2).

⁵On August 27, 2010, CH2M Hill filed an application for attorney's fees and expenses pursuant to LSA-R.S. 44:35(E)(2). The matter was set for hearing by the trial court, but it is undisputed that it was subsequently continued when Central City News filed its writ application.

⁶Also, Louisiana Press Association, Inc. filed an *amicus curiae* brief in support of Central City News' appeal of this matter.

The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

The initial burden of proof remains with the mover and it is not shifted to the non-moving party until the mover has properly supported the motion and carried the initial burden of proof. Only then must the non-moving party submit evidence showing the existence of specific facts establishing a genuine issue of material fact. See Scott v. McDaniel, 96-1509 (La. App. 1st Cir. 5/9/97), 694 So. 2d 1189, 1191-1192, writ denied, 97-1551 (La. 9/26/97), 701 So. 2d 991. If the non-moving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. LSA-C.C.P. arts. 966 and 967.

On a motion for summary judgment, it must first be determined that the supporting documents presented by the moving party are sufficient to resolve all material issues of fact, failing which the motion should be denied. Arnold v. Our Lady of the Lake Hospital, Inc., 562 So. 2d 1056, 1058 (La. App. 1st Cir. 1990). In determining whether material issues have in fact been disposed of, any doubt is to be resolved against granting the summary judgment and in favor of trial on the merits. Arnold v. Our Lady of the Lake Hospital, 562 So. 2d at 1058.

In determining whether summary judgment is appropriate, appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Sanders v. Ashland Oil, Inc., 696 So. 2d at 1035. Furthermore, an appellate court asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. Guardia v. Lakeview Regional Medical Center, 2008-1369 (La. App. 1st Cir. 5/8/09), 13 So. 3d 625, 627. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority, 984 So. 2d at 80.

When addressing legal issues, a reviewing court gives no special weight to the findings of the trial court. Campbell v. Markel American Insurance Company, 2000-1448 (La. App. 1st Cir. 9/21/01), 822 So. 2d 617, 620, writ denied, 2001-2813 (La. 1/4/02), 805 So. 2d 204. After conducting its *de novo* review of questions of law, the reviewing court renders a judgment on the record. Campbell v. Markel American Insurance Company, 822 So. 2d at 620.

Assignments of Error Numbers One and Two

Article XII, Section 3 of the Louisiana Constitution provides that no person shall be denied the right to examine public documents, except in cases established by law. The legislature has codified this right in the Public Records Act, LSA-R.S. 44:1, *et seq.*

As the jurisprudence recognizes, the Louisiana Public Records Law must be liberally interpreted to enlarge rather than to restrict the public's access to public records. Bozeman v. Mack, 97-2152 (La. App. 1st Cir. 12/21/98), 744

So. 2d 34, 36, writ denied, 99-0149 (La. 3/19/99), 740 So. 2d 113. Any doubt concerning the public's right of access to certain records must be resolved in favor of the public's right to see. Bozeman v. Mack, 744 So. 2d at 36. The purpose of the law is to keep the public reasonably informed about how public bodies conduct their business and how the affairs of government are handled. City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C., 2007-1088, 2007-1089 (La. App. 1st Cir. 10/10/08), 4 So. 3d 807, 817, writ dismissed by, 2008-2507, 2008-2525 (La. 1/16/09), 998 So. 2d 99, 100.

Pursuant to Louisiana's Public Records Law, a "public body" is defined as:

[A]ny branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function, or an affiliate of a housing authority.

LSA-R.S. 44:1(A)(1).

At the outset, we note that it is undisputed that CH2M Hill is a private, for-profit corporation operating pursuant to a contract with Central City. However, its status as such does not end our inquiry, given the broad definition of a "public body" in the above cited statute. Instead, the issue at the heart of the motions for summary judgment herein is whether, given its contractual relationship with Central City, wherein CH2M Hill provides Central City's essential services and operates the City of Central, CH2M Hill has, by contract and practice, made itself a "public body" within the meaning of Louisiana's Public Records Law, such that its records are subject to a public records request.

Central City News contends that CH2M Hill has positioned itself as the "contracted de facto" government of the City of Central and, therefore, is "obviously" serving as a governmental entity by providing a governmental function. Central City News argues that transparency in government cannot be

lost through privatization, as there is a constitutionally based responsibility owed to the people to protect citizens from dishonesty and to promote responsibility in government by allowing them to observe the deliberations and examine the records of their government. Finally, Central City News contends that when the functions of a government are transferred in a wholesale manner to a private entity, that private entity must be considered to be a stand-in for the municipality and a “public body” for purposes of the Louisiana Public Records Law, at least with respect to any records in its possession that in any way relate to the City of Central.

On review, we recognize that CH2M Hill is a **private**, for-profit corporation and is not a “branch,” “department,” “agency,” “political subdivision” or “governing authority,” as set forth in LSA-R.S. 44:1(A)(1). Thus, we agree with CH2M Hill that it is not a “public body” *per se*, as contemplated by these provisions of the statute. However, the fact that CH2M Hill is a private entity does not, *ab initio*, place the requested records outside the reach of a public records request. In Spain v. Louisiana High School Athletic Association, 398 So. 2d 1386 (La. 1981), where a private, voluntary association (LHSAA), was nonetheless found to be a “public body” under the definition contained in the Open Meetings Law, LSA-R.S. 42:4.2(A)(2),⁷ the Louisiana Supreme Court recognized that the connexity between the LHSAA and the Louisiana Board of Elementary and Secondary Education, the Superintendent of Education, and local school boards, must be considered, stating as follows:

The LHSAA performs a function which is, by law, entrusted to the various bodies established for the regulation of public education. It is **funded by public money** earned by state schools at athletic events. It has established a comprehensive set of rules and

⁷See now LSA-R.S. 42:43:13(A)(2).

regulations governing how public schools and their students must conduct themselves with regard to athletic and academic endeavors, all with the acquiescence and implied blessing of the legislature, Board of Elementary and Secondary Education, Superintendent of Education, and local school boards. See Seghers v. Community Advancement, Inc., 357 So. 2d 626 (La. App. 1st Cir. 1978). **Equally important is the degree of connexity between the regulatory functions of the LHSAA and the regulatory functions of a particular “public body” found in R.S. 42:4.2(A)(2). Here the connexity is close, since LHSAA performs a major policy-making, advisory and administrative function in an area that is within the primary control of public bodies listed in the Open Meetings Law. [Emphasis added.]**

Spain v. Louisiana High School Athletic Association, 398 So. 2d at 1390

(Footnote omitted).

Further, we note that the phrase “public body” as used in the public records act specifically includes “any other instrumentality” of state government within the definition and meaning of “public body.” While the phrase “instrumentality of ... municipal government” is not further defined in the public records statute, we recognize that as in Spain, the record before us shows there is a degree of connexity between CH2M Hill and the City of Central, given CH2M Hill’s administration of the City of Central’s government functions and services. Further, CH2M Hill presumably receives public money from the City of Central for these services, although the extent of such is likewise not readily apparent on the record as developed thus far. Thus, the precise nature and extent of such services and connexity are not developed in the record before us and the trial court did not make the mandated determination of connexity below. In sum, on the record before us, we are likewise unable to discern the extent of the “connexity” to resolve whether CH2M Hill’s contract and operations render it an “instrumentality” of the city’s government and, thereby, subject to the public records request as such.

Instead, on review, we find the supporting documents presented by both sides are insufficient to resolve all material issues of fact regarding the

connexity of CH2M Hill and the City of Central. Moreover, we question whether such fact-based issues can be resolved on summary judgment. Further, given the strong public policy interests supporting open access to government records, we agree that the trial court must make the necessary case-by-case determination of connexity after a full evidentiary hearing on whether CH2M Hill is an instrumentality of government herein. Accordingly, we find that this matter is not appropriate for resolution by summary judgment in favor of either party.

Thus, we find merit, in part, to these assignments of error.⁸

CONCLUSION

For the above and foregoing reasons, the August 11, 2010 judgment of the trial court, granting summary judgment in favor of CH2M Hill and denying the cross-motion for summary judgment filed by Central City News, is hereby vacated. The matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Further, CH2M Hill's answer to the appeal is hereby denied as moot.⁹

Costs of this appeal are assessed equally to the parties.

VACATED AND REMANDED; ANSWER TO APPEAL DENIED.

⁸While so finding, we nonetheless find merit to CH2M Hill's argument that the records request may be overbroad, given that it performs services for multiple clients unrelated to the business of the City of Central. On remand, the trial court can make the necessary determination as to whether particular records are subject to inspection and can take appropriate steps to ensure proper disclosure, including conducting an in camera inspection, if requested.

⁹Any pleadings previously filed with the trial court concerning costs incurred therein can be raised or reset before the trial court.