

OCT 29 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JO C. DAGUE, INDIVIDUALLY AND
AS SPECIAL ADMINISTRATOR OF
THE ESTATE OF LARRY L. DAGUE,

Plaintiff - Appellant,

v.

KEVIN DUMESIC, GREG HAZEN,
MIKE HORN, LAS VEGAS
METROPOLITAN POLICE
DEPARTMENT,

Defendants- Appellees.

No. 09-16427

D.C. No. 2:05-cv-0533-JCM-RJJ

MEMORANDUM*

Appeal from the United States District Court
District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted October 7, 2010
San Francisco, California

Before: RYMER and N.R. SMITH, Circuit Judges, and LEIGHTON **, District
Judge

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

Appellant Joe Dague appeals the District Court's denial of reconsideration of the magistrate's order awarding attorney's fees to appellees. The standard of review is abuse of discretion. *See United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

Based on the record, the magistrate did not abuse his discretion by holding that the correspondence via mail between the parties did not satisfy the "meet and confer" requirement of Fed. R. Civ. P. 37(a) and D. Nev. R. 26-7(b). *See Shufflemaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996) Upon denying the motion to compel, it was within the magistrate's discretion to award attorney fees to appellees under Fed. R. Civ. P. 37(a)(5)(B). Thus, the district court did not abuse its discretion in denying the reconsideration of the magistrate's order. The appellee's request for attorney's fees on the appeal is denied because the appeal is not frivolous.

AFFIRMED.