2006 Nevada Supreme Court Opinion Digest

George v. State, 122 Nev. Adv. Op. No. 1 (January 19, 2006) - The Court reverses a conviction by jury verdict on six counts of sexual assault and five counts of lewdness with a minor, ruling that 1) filing a notice of appeal in a criminal case after rendition of the verdict but before sentencing will not deprive the Court of jurisdiction over the appeal under NRAP 4(b)(1) and NRS 177.015; and 2) the State must provide an indigent defendant with a transcript of prior proceedings when the defendant needs the transcript for an effective direct appeal (citing Britt v. North Carolina, 404 U.S. 226 (1971)).

Bedore v. Familian, 122 Nev. Adv. Op. No. 2 (January 19, 2006) - The Court affirms in part and reverses in part a district court order directing a corporate buy-out as the result of a breach of fiduciary duty, ruling that 1) before ordering a corporate buy-out as an equitable remedy, the district court must find that the directors' misconduct warranted the corporation's dissolution; and 2) corporate directors who act in bad faith are not entitled to indemnification under NRS 78.7502.

Waddell v. L.V.R.V. Inc., 122 Nev. Adv. Op. No. 3 (January 19, 2006) - The Court affirms in part and reverses in part a district court judgment and an order awarding attorney fees and costs in a contract action, ruling that 1) the district court did not err in allowing appellants/cross-respondents to revoke their acceptance of a RV within a reasonable time pursuant to NRS 104.2608; 2) the district court properly denied respondent/cross-appellant's motion for attorney fees; 3) substantial evidence supports the district court's determination that respondent/cross-appellant was not entitled to indemnification; 4) the district court did not abuse its discretion in denying the appellants/cross-respondents' computerized research costs; and 5) appellants/cross-respondents are entitled to post-judgment interest on their attorney fees award pursuant to NRS 17.130(1).

Moore v. State, 122 Nev. Adv. Op. No. 4 (January 19, 2006) - The Court affirms in part and reverses in part a conviction, upon jury verdict, of one count of burglary, one count of fraudulent use of a credit card, and one count of possession of a credit card without the cardholder's consent, ruling that 1) presentment alone does not constitute use and requires reversal of appellant's conviction for fraudulent use of a credit card ("the word "use" in NRS 205.760(1)(a) is ambiguous . . . for fraudulent use of a credit card to occur, the credit card must be processed and the account charged"); 2) sufficient evidence supports appellant's conviction for possession of a credit card without the cardholder's consent; 3) the State proved beyond a reasonable doubt that appellant possessed the requisite intent for burglary; 4) that appellant's failure to object to the district court's selection of the alternate jurors precludes review; and that the district court properly considered prior convictions in adjudicating appellant a small habitual criminal pursuant to NRS 207.010(1)(a).

International Fid. Ins. v. State of Nevada, 122 Nev. Adv. Op. No. 5 (February 2, 2006) – The Court dismissed eight consolidated appeals from district court orders denying motions to remit surety bonds, ruling that the proper mode of review for orders entered in ancillary bail bond proceedings is by an original writ petition.

Mason v. Cuisenaire, 122 Nev. Adv. Op. No. 6 (February 9, 2006) – The Court affirms in part and reverses in part a district court order awarding child support, ruling that 1) the district court did not err in giving a North Carolina divorce decree full faith and credit; 2) North Carolina law controls analysis of the decree; 3) because the North Carolina divorce decree made no provision for child support, there was no child support order entered; and 4) North Carolina law applies and the district court may retroactively award support.

Sustainable Growth v. Jumpers, LLC, 122 Nev. Adv. Op. No. 7 (February 9, 2006) – The Court reverses a district court summary judgment order in a ballot initiative matter, ruling that the Douglas County Sustainable Growth Initiative (which limits the number of new dwelling units in the county to 280 per annum) does not conflict with the Douglas County Master Plan and the district court should not have held the SGI void ab initio.

Thomas v. City of North Las Vegas, 122 Nev. Adv. Op. No. 9 (February 9, 2006) – In two consolidated appeals from a district court order denying a motion for attorney fees and from district court orders vacating two related arbitration awards involving two former employees of the North Las Vegas Police Department who arbitrated their grievances regarding their terminations with the City of North Las Vegas, the Court 1) affirms the district court's denial of attorney fees to the former employees; and 2) reverses the district court orders vacating the arbitration awards on an erroneous application of the evident partiality standard, and remands to the district courts to confirm the arbitration awards.

McCrary v. Bianco, 122 Nev. Adv. Op. No. 10 (February 9, 2006) – The Court affirms in part and reverses in part post-verdict district court orders awarding attorney fees based upon the cost-shifting provisions of NRCP 68 and NRS 17.115 and denying a motion for partial satisfaction of judgment, ruling that district courts must, where applicable and where the offer does not preclude such a comparison, include pre-offer prejudgment interest along with the principal judgment amount when comparing the judgment obtained and an offer of judgment in post-trial proceedings for relief under the rule and statute. The Court held that the district court properly excluded pre-offer attorney fees and costs in making its comparison below, but erred in not including pre-offer prejudgment interest in the comparison between the offer and the judgment entered at trial.

State Drywall v. Rhodes Design & Dev., 122 Nev. Adv. Op. No. 11 (February 9, 2006) – The Court reverses a district court judgment and an order awarding attorney fees and costs in a breach of contract action, ruling that 1) a plaintiff is entitled to prejudgment interest on money paid under the contract during a pending collection suit, even though that payment is not included in the principal amount of the subsequent judgment; and 2) for purposes of determining cost-shifting under NRCP 68(g) and NRS 17.115(5), pre-offer prejudgment interest must be computed on payments made during the pendency of the suit and added to the actual judgment when it is compared to the offer of judgment despite the offer's silence on the inclusion of interest.

Cable v. EICON, 122 Nev. Adv. Op. No. 12 (February 9, 2006) – The Court reverses a district court order granting summary judgment in an employment matter, ruling that privatization of the state's industrial insurance system made its former employees eligible for a statutory buyout of retirement service credit.

International Game Tech. v. Dist. Ct., 122 Nev. Adv. Op. No. 13 (February 9, 2006) – The Court grants consolidated writ petitions challenging district court orders denying motions to dismiss false claims actions, ruling that while private plaintiffs may properly bring actions under Nevada's False Claims Act (FCA) based on tax deficiencies under some circumstances, state law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation. Accordingly, the Attorney General's assertion that an FCA action implicates issues that are better left, initially, to the tax department's expertise constitutes a basis for good cause dismissal; and, as no party demonstrated that the Attorney General acted improperly in moving to dismiss the underlying actions, the district courts manifestly abused their discretion when they refused to dismiss the underlying tax-based false claims actions for good cause.

Redeker v. Dist. Ct., 122 Nev. Adv. Op. No. 14 (February 9, 2006) – The Court grants a writ petition challenging primarily the alleged aggravating circumstance that petitioner was convicted of a felony involving the use or threat of violence to the person of another, based on his prior conviction of second-degree arson, ruling that the State's notice of intent to seek death did not comply with SCR 250(4)(c), failing to allege with specificity any facts showing that petitioner's arson involved the use or threat of violence to the person of another.

In re Resort at Summerlin Litigation, 122 Nev. Adv. Op. No. 15 (February 9, 2006) – The Court affirms a district court judgment following a bench trial, certified as a final judgment under NRCP 54(b), that determined the priority and validity of a deed of trust in relation to various mechanic's liens, and a post-judgment district court order denying a request for costs. The Court rules that a

holder of a deed of trust that has not elected to be bound by the terms of NRS Chapter 106 may maintain priority, over mechanic's lien claimants, for future advances where the property owner declared bankruptcy, on the basis that parties that do not elect to be bound by NRS Chapter 106 are not subject to its provisions, thus, common-law principles regarding future advances apply. The Court also rules that the district court was correct in not applying the standard costs provisions of NRS Chapter 18, instead applying NRS 108.239(6), and holding that under that statute, only a prevailing lien claimant is entitled to costs and that costs are assessed against the property owner.

Simonian v. UCCSN, 122 Nev. Adv. Op. No. 16 (February 23, 2006) – The Court affirms in part and reverses in part a district court order granting summary judgment and awarding attorney fees as sanctions in a false claims action, ruling that, as a state entity, UCCSN is not subject to liability under Nevada's False Claims Act (FCA), but that, as the district court never reached the merits of appellant's action and the record contains insufficient information to support the district court's determination that the false claim action was not well-grounded in fact or law, the award of attorney fees to UCCSN was improper.

Herman v. State, 122 Nev. Adv. Op. No. 17 (February 23, 2006) – The Court affirms in part and reverses in part (remanding for a new sentencing phase) a judgment of conviction, upon jury verdict, of first-degree murder, ruling that DNA evidence voluntarily submitted to a public facility to absolve a defendant of a crime may be used in an unrelated criminal prosecution; but that reading a presentence report to a sentencing jury is error when the report cannot be made part of the public record.

State v. Sargent, 122 Nev. Adv. Op. No. 18 (February 23, 2006) – The Court affirms a district court order granting a petition for a writ of certiorari and directing the justice court to vacate an order requiring a defendant to appear in person at a preliminary hearing, ruling that that justice courts do not have the jurisdictional power to order a defendant to appear in person at a preliminary hearing where the defendant has appeared through counsel and has filed a waiver of personal appearance.

Carson-Tahoe Hosp. v. Bldg. & Constr. Trades, 122 Nev. Adv. Op. No. 19 (March 2, 2006) – The Court reverses a district court order granting respondents' petition for declaratory judgment, ruling that a project under NRS 244A.763(5) is subject to prevailing wage requirements only if the project is a "public work" and involves a "public body," as those terms are defined in NRS 338.010, and concluding that the Carson-Tahoe Hospital project does not fit the definition of a public work and does not involve a public body.

Koller v. State, 122 Nev. Adv. Op. No. 20 (March 16, 2006) – The Court reverses a district court order granting a writ of prohibition, ruling that justice courts have jurisdiction to hear a motion to dismiss a felony complaint for violations of both the Interstate Agreement on Detainers and NRS 171.070, and remands for the district court to vacate its writ and allow the justice court to determine the merits of appellant's motion to dismiss.

Las Vegas Police Prot. Ass'n v. Dist. Ct., 122 Nev. Adv. Op. No. 21 (March 16, 2006) – The Court, in consolidated cases challenging a district court order enforcing an advisory review board's subpoena that directed a police officer to appear before the board during its review of an investigation regarding a citizen complaint, rules that the district court properly enforced the board's subpoena under NRS 289.390(1)(c) since the subpoena was issued within the context of the advisory review board's evaluation of a police department's internal investigation concerning departmental policy violations and the board was acting within the scope of its jurisdiction.

Ledbetter v. State, 122 Nev. Adv. Op. No. 22 (March 16, 2006) – The Court affirms a judgment of conviction by jury verdict, of 14 counts of sexual assault on a minor under 14 years old and 12 counts of sexual assault on a minor under 16 years old, and remands for the limited purpose of correcting errors in the written judgment of conviction. Notably, the Court rules that the district court did not abuse its discretion by permitting the State to admit evidence of the defendant's uncharged prior sexual abuse of other minors pursuant to NRS 48.045(2) to show his motive for sexually assaulting the victim in this case.

Mendoza v. State, 122 Nev. Adv. Op. No. 23 (March 16, 2006) – The Court affirms a judgment of conviction by jury verdicts on various criminal charges, ruling that to sustain convictions for both robbery and kidnapping, whether charged in the first or second degree, arising from the same course of conduct, any movement or restraint must substantially increase the risk of danger to the victim over and above that necessarily present in the crime of robbery; or the seizure, restraint, confinement or movement, etc., must substantially exceed that required to commit the robbery. Notably, the Court provides a sample instruction governing such charges for future use within the Nevada district court system.

Avery v. State, 122 Nev. Adv. Op. No. 24 (March 16, 2006) – The Court affirms the denial of a post-conviction petition for a writ of habeas corpus, ruling that the requirement of Palmer v. State (118 Nev. 823, 59 P.3d 1192 (2002)) [when a defendant pleads guilty to an offense that is subject to lifetime supervision, the record must demonstrate that the defendant was aware of the consequence of lifetime supervision before entering his or her plea of guilty] does NOT apply retroactively.

Silvar v. Dist. Ct., 122 Nev. Adv. Op. No. 25 (March 16, 2006)- The Court grants a petition for a writ of certiorari challenging a district court decision upholding the constitutionality of Clark County Ordinance 12.08.030, ruling that Clark County's prostitution loitering ordinance is both unconstitutionally vague and overbroad.

Barnhart v. State, 122 Nev. Adv. Op. No. 26 (March 16, 2006) – The Court affirms a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Notably, the Court rules that the district court may exercise its discretion under certain circumstances to permit a petitioner to assert claims not previously pleaded, provided that the district court should not resolve those issues without allowing the State the opportunity to respond.

Matter of Guardianship of N.S., 122 Nev. Adv. Op. No. 27 (March 16, 2006) – The Court grants consolidated original petitions for a writ of mandamus, challenging district court orders denying a maternal grandmother's petition for guardianship and petition for visitation with her minor granddaughter, ruling that the district court failed to comply with Nevada's abuse and neglect statutes, NRS Chapter 432B, by not ensuring that the grandmother, a relative with a special interest in the child, was involved in and notified of the placement plan before it granted custody of the child to the State, thereby depriving her of the benefit of the familial preference for placement. Further, the district court erroneously gave great weight to the foster parents' opposition to visitation over the other mandatory factors set forth in the visitation statute, NRS 125C.150.

Edwards v. Emperor's Garden Rest., 122 Nev. Adv. Op. No. 28 (March 30, 2006) - The Court affirms in part and reverses in part consolidated pro se appeals from district court orders dismissing complaints alleging violations of federal Telephone Consumer Protection Act and state laws, and appeal from an order awarding attorney fees as sanctions, ruling that the district court has original jurisdiction over injunction requests, a complaint properly requesting both monetary and injunctive relief for TCPA violations invokes the court's jurisdiction over that complaint.

City of Henderson v. Kilgore, 122 Nev. Adv. Op. No. 29 (March 30, 2006) – The Court reverses a district court order denying writ petitions and enforcing an Employee-Management Relations Board order that granted a preliminary injunction, ruling that the Local Government Employee-Management Relations Act, NRS Chapter 288, does not expressly grant the EMRB power to issue preliminary injunctive relief and that such power cannot be implied.

Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist., 122 Nev. Adv. Op. No. 30 (March 30, 2006) - The Court affirms a district court order confirming an arbitration award, clarifying the two common-law grounds available for a court to review a private arbitration award set forth in Wichinsky v. Mosa, 109 Nev. 84, 847 P.2d 727 (1993). First, when considering whether the award is arbitrary, capricious, or unsupported by the arbitration agreement, the reviewing court may only concern itself with the arbitrator's findings and whether they are supported by substantial evidence or whether the subject matter of the arbitration is within the arbitration agreement. Second when considering whether the arbitrator manifestly disregarded the law, the reviewing court may only concern itself with whether the arbitrator knew of the law and, if so, consciously disregarded it, not whether the private arbitrator's interpretation of the law was correct.

Medina v. State, 122 Nev. Adv. Op. No. 31 (March 30, 2006) – The Court affirms a conviction by jury verdict of five counts of sexual assault of a victim 65 years or older, one count of first-degree kidnapping of a victim 65 years or older, and one count of failure to change address by a convicted sex offender, ruling that an out-of-court statement made by a rape victim a day after the event falls within the excited utterance exception to the hearsay rule (NRS 51.095), thus clarifying Browne v. State (113 Nev. 305, 933 P.2d 187 (1997)) to establish that the proper focus of the excited utterance inquiry is whether the declarant made the statement while under the stress of the startling event.

Casteel v. State, 122 Nev. Adv. Op. No. 32 (March 30, 2006) – The Court affirms in part and reverses in part a conviction by jury verdict of 10 counts of sexual assault of a minor and 12 counts of use of a minor under the age of 14 in the production of pornography. Citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990), the Court holds in pertinent part that a warrantless search of a residence is valid based on the consent of one occupant where the other occupant fails to object. [NOTE - Compare the U.S. Supreme Court's recent ruling in Georgia v. Randolph, No. 04–1067 (March 22, 2007)]. Further, citing the factors pertinent to the objective custody determination set forth in Alward v. State (112 Nev. 141, 154, 912 P.2d 243, 252 (1996)), the Court rules that the defendant was not in custody at the time the detectives interviewed him at the sexual assault detail office and his statements were therefore admissible under Miranda. Finally, the Court reverses 8 of the child pornography counts on the basis that the State failed to prove production depicting separate sexual performances, citing Wilson v. State, 121 Nev. ___, 114 P.3d 285 (2005).

Nolan v. State, 122 Nev. Adv. Op. No. 33 (April 20, 2006) – The Court affirms in part and reverses in part jury convictions on various criminal charges in two separate trials, ruling that unverified information provided by posthypnotic testimony is inadmissible under NRS 48.039(2) because a person previously hypnotized to improve his or her recollection cannot reliably determine whether the unverified information is his or her own memory or induced by the hypnotic experience.

Edwards v. State, 122 Nev. Adv. Op. No. 34 (April 27, 2006) – The Court reverses a jury conviction of one count of possession of a firearm by an ex-felon, ruling that under Old Chief v. United States, 519 U.S. 172 (1997), in a prosecution for possession of a firearm by an ex-felon, if the accused offers to stipulate that he has been convicted of a prior felony or felonies, the admission of the prior convictions is unduly prejudicial when its sole purpose is to prove ex-felon status. Notably, the Court also concludes that the State's failure to prove the corpus delicti of the crime with evidence independent of the defendants' own extrajudicial admissions constitutes plain error warranting reversal.

Stockmeier v. State, Dep't of Corrections, 122 Nev. Adv. Op. No. 35 (April 27, 2006) – The Court reverses a district court order granting a motion to dismiss, ruling that the appellant, an incarcerated sex offender who must receive certification from the Psychological Review Panel that he does not represent a high risk to reoffend, validly asserted open meeting law claims under NRS chapter 241, on the basis that 1) Psychological Review Panel hearings under NRS 213.1214 are not an exempt quasi-judicial proceeding and are therefore subject to the open meeting law; 2) appellant is a "person" under NRS 241.037(2) and is not required to meet the federal constitutional standing requirements of Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); 3) while prisoners forfeit some open meeting law rights while incarcerated, because appellant attended and was the subject of the Psych Panel hearing, he is entitled to adequate notice of the meeting under NRS chapter 241.

Ford v. State, 122 Nev. Adv. Op. No. 36 (April 27, 2006) – The Court affirms a jury conviction of one count of conspiracy to commit robbery and one count of robbery with the use of a deadly weapon, ruling that the State's use of peremptory challenges to exclude three African-American prospective jurors from the jury, when considered in the totality of the jury-selection process, was not a pretext for discrimination, under Batson v. Kentucky 476 U.S. 79 (1986) and Miller-El v. Dretke 545 U.S. ___, ___, 125 S. Ct. 2317, 2325 (2005).

Albios v. Horizon Communities, Inc., 122 Nev. Adv. Op. No. 37 (April 27, 2006) – The Court affirms in part and reverses in part a district court judgment, entered on a jury verdict, awarding prejudgment interest, costs, and attorney fees in a constructional defect case, ruling that 1) although NRS 40.655 allows constructional defect claimants to recover attorney fees and costs as an element

of damages, NRS 40.655 does not preclude application of the penalty provisions of NRCP 68(f) and NRS 17.115(4); and 2) successive offers of judgment extinguish previous offers and, therefore, the last offer of judgment is controlling for purposes of NRCP 68 and NRS 17.115. The Court found that when prejudgment interest is appropriately added to the Albioses' verdict, the Albioses recovered more than Horizon's last offer and were properly awarded their attorney fees and costs; however, the Court remands for recalculation of attorney fees and prejudgment interest, finding that the district court 1) abused its discretion by not considering the factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31 (1969) and 2) erroneously calculating prejudgment interest and by disallowing prejudgment interest on costs and attorney fees.

Matter of William S., 122 Nev. Adv. Op. No. 38 (April 27, 2006) – The Court reverses a juvenile court order certifying a minor for criminal proceedings as an adult, ruling that while the juvenile court properly applied the certification statute [NRS 62B.390] by considering discretionary certification after the defendant had rebutted presumptive certification, the Court's clarification of discretionary certification in the opinion compels a reversal of the certification order and remand to the juvenile court to reconsider certification under the clarified discretionary certification standard.

Bass-Davis v. Davis, 122 Nev. Adv. Op. No. 39 (May 11, 2006) – The Court grants a petition for en banc reconsideration of a panel decision in an appeal from a final judgment and an order denying appellant's motion for a new trial,and reverses and remands for a new trial. In considering evidence that is lost after being forwarded from franchisees to their franchisor, the Court holds that, due to the potential consequences to the nonspoliating party, an NRS 47.250(3) rebuttable presumption only applies in cases involving willfully destroyed evidence; however, the jury, when properly instructed, is permitted to draw an adverse inference when evidence is lost or destroyed through negligence. The Court rules that the district court abused its discretion by refusing to either give an adverse inference instruction, permitting the jury to infer that the lost evidence would have been unfavorable to the franchisees or to impose other appropriate sanctions for the lost evidence, and that the district court also improperly admitted evidence of a collateral source of payment.

Insurance Co. of the West v. Gibson Tile, 122 Nev. Adv. Op. No. 40 (May 11, 2006) – The Court reverses a district court judgment on a jury verdict in a contract dispute, ruling that 1) the district court erred when it prevented ICW's claim for indemnity against Gibson from proceeding based on language in an order denying ICW's motion for reconsideration of Gibson's good-faith settlement with the two suppliers; 2) as a matter of law, an insurance bad-faith claim does not lie against a surety because there is no special relationship between a surety

and its principal; 3) as a result, the district court erred when it instructed the jury that a surety owes its principal a fiduciary duty; 4) the award of punitive damages was improper because ICW could only be held liable for breach of contract; and 5) as a matter of law, the jury could not find that an oral contract for the issuance of additional bonds existed between the parties because Gibson did not tender any additional consideration to ICW for a new oral contract or a modification of the existing contract.

General Motors Corp. v. Dist. Ct., 122 Nev. Adv. Op. No. 41 (May 11, 2006) – On an original writ petition, the Court clarifies Nevada's choice-of-law jurisprudence in tort actions and overrules Motenko v. MGM Dist., Inc., 112 Nev. 1038, 1039, 921 P.2d 933, 934 (1996), holding that the most significant relationship test, as provided in the Restatement (Second) of Conflict of Laws section 145, should govern the choice-of-law analysis in tort actions unless a more specific section of the Second Restatement applies to the particular tort claim.

Griffin v. Old Republic Ins. Co., 122 Nev. Adv. Op. No. 42 (May 11, 2006) – In response to a certified question submitted by the United States Court of Appeals for the Ninth Circuit, the Court rules that insurers need not establish a causal connection between an aviation policy exclusion and the loss in order to avoid liability so long as the exclusion is unambiguous, narrowly tailored, and essential to the risk undertaken by the insurer.

Mejia v. State, 122 Nev. Adv. Op. No. 43 (May 25, 2006) – The Court affirms a jury conviction of one count of sexual assault against a minor under 14 years of age and seven counts of lewdness with a minor under 14 years of age, ruling that Miranda-like warnings are not required prior to a social worker's interview because conditioning a child custody placement recommendation upon honest answers to a social worker's questions does not cut off an individual's free choice to exercise the right to remain silent.

Seput v. Lacayo, 122 Nev. Adv. Op. No. 45 (May 25, 2006) – The Court reverses a district court order granting a motion to dismiss in a torts action, ruling that a homeowner is not immune under the workers' compensation statutes from a premises liability suit brought by an employee of a pest control contractor (the pest control service employee was injured when he fell through a hole in the second story floor while performing the contracted extermination services), since the pest control service worker is not the homeowner's employee as defined under NRS 616A.110.

Attaguile v. State, 122 Nev. Adv. Op. No. 46 (May 25, 2006) – The Court vacates a conviction, pursuant to a guilty plea, of one count of possession of a controlled substance with intent to sell, ruling that 1) in determining eligibility for rehabilitative treatment under NRS 458.300, the district court may not count a

judgment of conviction it has yet to enter as a prior felony conviction; 2) the district court erroneously construed the appellant's prior conviction of two felony counts as two separate, prior felony convictions; and 3) based upon the foregoing, appellant will be eligible to have the instant offense set aside under NRS 458.330 if she successfully completes a treatment program.

Arbella Mut. Ins. Co. v. Dist. Ct., 122 Nev. Adv. Op. No. 47 (May 25, 2006) – The Court denies a writ petition challenging the district court's failure to dismiss a breach of contract and bad faith action against an insurance company for lack of personal jurisdiction, ruling that the insurance company purposefully subjected itself to being sued in a Nevada forum by way of its policy's territory coverage clause, on the basis that 1) insurance companies have the contractual ability to limit or expand the areas of their coverage; 2) the petitioning insurance company purposefully availed itself of the Nevada forum by including Nevada within its territory coverage clause; and 3) under the facts of this case, exercising jurisdiction over the petitioner is reasonable.

Winston Products Co. v. DeBoer, 122 Nev. Adv. Op. No. 48 (May 25, 2006) – The Court denies a motion to dismiss appeal for lack of jurisdiction, and revises the method used to compute the time for filing motions for judgment as a matter of law and for a new trial and the tolling period to file a notice of appeal when these motions are served by mail or electronic means. The Court's analysis is as follows: the Nevada Rules of Civil Procedure require these so-called tolling motions to be filed within 10 days from the date a judgment is filed and served. However, the 2004 amendments to the NRCP changed the computation of time where the prescribed period is less than 11 days to exclude Saturdays, Sundays and nonjudicial days. Where, as here, the time to file a tolling motion is 10 days, the "period of time prescribed" in NRCP 6(a) does not include the 3-day allowance for service by mail under NRCP 6(e). Therefore, the filing period for a tolling motion is computed first under NRCP 6(a), and then 3 additional days are added under NRCP 6(e) when service was made by mail or electronic means. Using this computation method, the Court concludes that appellant's tolling motions were timely filed in the district court.

City of North Las Vegas v. Robinson, 122 Nev. Adv. Op. No. 49 (May 25, 2006) – The Court reverses a judgment and a post-judgment order awarding costs in an eminent domain case, ruling that the district court's valuation instructions improperly required the jury to ignore the highest and best use of the entire property.

Stockmeier v. State, Dep't of Corrections, 122 Nev. Adv. Op. No. 50 (June 1, 2006) – The Court grants a pro per petition for rehearing in an appeal from a district court order denying and dismissing appellant's writ petition, ruling that the appellant, an incarcerated sex offender serving the first of two consecutive

sentences, is not required to obtain certification from the Psychological Review Panel that he does not represent a high risk to reoffend, on the basis that NRS 213.1214 only applies to prisoners being released into society; it does not apply to sex offenders being institutionally paroled from one sentence to begin serving the next consecutive sentence. The Court further rules that NRS 213.1214(4) does not prevent Stockmeier from alleging violations of his constitutional rights that occurred before and during the course of the Psych Panel hearing or challenging the validity of the statute itself the statute only prohibits actions challenging the Psych Panel's decision whether to certify a prisoner and a decision refusing to place a prisoner before the Psych Panel.

Houston v. Dist. Ct., 122 Nev. Adv. Op. No. 51 (June 15, 2006) – The court grants in part and denies in part a petition for a writ of mandamus that challenges a district court order, holding petitioner in contempt and fining him, ruling that under NRS 22.030(1), governing summary contempt proceedings for direct contempt committed in a judge's presence, a judge's oral contempt order is immediately effective and enforceable to punish the contempt but that a written order, setting forth the conduct constituting the contempt in detail, must thereafter be promptly entered.

Bongiovi v. Sullivan, 122 Nev. Adv. Op. No. 52 (July 13, 2006) – The Court affirms a district court judgment on a jury verdict in a defamation case, ruling that 1) the district court did not abuse its discretion by denying appellants' request for a trial continuance; 2) respondent Sullivan did not voluntarily interject himself into a public controversy, and therefore, the district court properly concluded that he was not a limited-purpose public figure; 3) the district court did not improperly allow hearsay or inflammatory testimony; and 4) appellants did not demonstrate that there was error in either the compensatory or punitive damages awards.

Century Steel v. State, Div. Indus. Relations, 122 Nev. Adv. Op. No. 53 (July 13, 2006) - The Court affirms a district court order denying judicial review of an administrative decision concerning workplace safety violations, ruling that 1) an employer commits a "willful violation" under NRS 618.635 when it acts in an intentional, deliberate, knowing, and voluntary manner and the action is taken with either intentional disregard or plain indifference to the relevant requirements; and 2) the Occupational Safety and Health Review Board's conclusion that appellant Century Steel willfully violated a workplace safety regulation is supported by substantial evidence.

Mikohn Gaming v. Espinosa, 122 Nev. Adv. Op. No. 54 (July 13, 2006) – The Court affirms a district court order denying a petition for judicial review in a workers' compensation case, ruling that 1) depositing the decision with the State Mail Service did not satisfy service by mail under NRCP 5(b)(2)(B) because a document is not mailed until it is placed in the care of a business providing general delivery services to the public or deposited with the United States Postal

Service; 2) the petition was therefore timely filed under NRS 233B.130(2)(c); and 3) substantial evidence supports the appeals officer's determination and application of the last injurious exposure rule.

Kerala Properties, Inc. v. Familian, 122 Nev. Adv. Op. No. 55 (July 13, 2006) – The Court affirms a district court judgment, on remand, in a contract action, ruling that the district court did not err in calculating the prejudgment interest award on the basis that 1) under NRS 99.040(1), the proper prejudgment interest rate is the single rate in effect on the date of the transaction, which is the date the original contract was signed; 2) the Court has previously held that under NRS 17.130(2), the statute governing prejudgment interest in noncontract actions, the prejudgment interest rate must be calculated at the single rate in effect on the date when the judgment is entered; and 3) the Court extends that interpretation to the six-month interest rate adjustment requirement of NRS 99.040(1) and concludes that the January 1 and July 1 interest rate adjustment applies only to the postjudgment interest award.

Baltazar-Monterrosa v. State, 122 Nev. Adv. Op. No. 56 (July 13, 2006) – The Court affirms a jury conviction of one count each of first-degree murder with the use of a deadly weapon and robbery, ruling that recorded police interviews with non-English-speaking defendants need not be conducted by certified translators unconnected to the police department. The Court further rules that when a dispute arises over the accuracy of the translation, the district court should 10 appoint an independent and, if available, certified interpreter to review the disputed statements and provide an independent translation; 2) review any alleged translation discrepancies to determine whether they fundamentally alter the context or substance of the statement; 3) when fundamental differences exist, the statements should not be admitted; and 4) if the district court decides to admit the statements, it must provide all versions of the statements for consideration by the trier of fact. In this case, the State and appellant stipulated at trial to the overall accuracy of the police translations, and the court interpreters who raised the translation issue testified that they agreed with the stipulation; therefore, the district court did not abuse its discretion in admitting the police interviews and appellant's due process right to a fair trial was not violated.

Shoen v. SAC Holding Corp., 122 Nev. Adv. Op. No. 57 (July 13, 2006) – The Court reverses a district court order dismissing several shareholder derivative suits and clarifies the test for determining whether a complaint sufficiently alleges demand futility, ruling that when a shareholder's demand would be made to the same board that voted to take (or reject) an action, so that the allegedly improper action constitutes a business decision by the board, a shareholder asserting demand futility must allege, with particularity, facts that raise a reasonable doubt as to the directors' independence or their entitlement to protection under the business judgment rule. However, when a board does not affirmatively make a business decision or agree to the subject action, the demand requirement will be excused as futile only when particularized pleadings show that at least fifty

percent of the directors considering the demand for corrective action would be unable to act impartially.

McCarran Int'l Airport v. Sisolak, 122 Nev. Adv. Op. No. 58 (July 13, 2006) – The Court affirms an inverse condemnation judgment, ruling that the district court properly concluded that a county height restriction ordinance effected a "per se" taking of the airspace above private land that is located within the departure critical area of an airport approach zone, a regulatory per se taking under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

Hall v. Enterprise Leasing Co., 122 Nev. Adv. Op. No. 59 (July 13, 2006) – The Court affirms a district court order dismissing a negligence action with prejudice, clarifying prior rulings in Salas v. Allstate Rent-A-Car, Inc. [116 Nev. 1165, 14 P.3d 511 (2000)] and Alamo Rent-A-Car v. State Farm [114 Nev. 154, 953 P.2d 1074 (1998)], concerning the interplay between NRCP 68 and the requirements of NRS 482.295 relating to third-party liability coverage relating to short-term automobile rentals. The Court concludes that 1) the existence of insurance provided by the lessee does not automatically exonerate the statutory liability coverage provided by the short-term lessor of a motor vehicle; 2) the lessor's obligation to pay is conditioned solely upon the legal liability of the lessee to a third party for damages; 3) Nevada is not a "direct action" state, but rather, allows actions by third-party tort claimants against third-party liability coverage providers only after a judgment against the tortfeasor has been obtained; and 4) because the legal liability of the short-term lessee was a condition precedent to the right to collect, acceptance of an offer of judgment by the tort claimant in this case barred any recovery against the short-term lessor.

Ennis v. State, 122 Nev. Adv. Op. No. 60 (July 13, 2006) – The Court affirms an order of the district court denying a post-conviction habeas petition, ruling that Crawford v. Washington, 541 U.S. 36 (2004) (testimonial hearsay statements made by an unavailable witness must be subject to a prior opportunity for cross-examination in order to be admissible) does not apply retroactively to post-conviction proceedings, and appellant's counsel did not render ineffective assistance.

Hudson v. Jones, 122 Nev. Adv. Op. No. 61 (July 13, 2006) – The Court reverses a district court order altering a child custody arrangement, ruling that when a district court grants a nonparent joint legal and primary physical custody of a child, the parental preference doctrine does not apply to subsequent motions to modify custody; instead, a parent seeking to modify custody must show that the circumstances of either the parent or nonparent have been materially altered and that the child's welfare would be substantially enhanced by the change in custody.

Abbott v. State, 122 Nev. Adv. Op. No. 62 (July 13, 2006) – The Court reverses a judgment of conviction, upon a jury verdict, of two counts of lewdness with a child under the age of fourteen and an order denying a motion for a new trial. The victim had previously made allegedly false allegations against appellant, as well as against her father and schoolmates, and had also engaged in sexual behavior since she was four years old. Based on this, appellant attempted to introduce evidence of the prior false allegations and asked the district court for an independent psychological evaluation; the district court denied both requests. First, the Court rules that State v. District Court (Romano) [120 Nev. 613, 97 P.3d 594 (2004)] impermissibly restricts a defendant's access to an independent psychological examination of an alleged victim-witness, and overrules Romano and reinstates the test set forth in Koerschner v. State [116 Nev. 1111, 13 P.3d 451 (2000)]. Second, the Court modifies Chapman v. State [117 Nev. 1, 16 P.3d 432 (2001)], holding that the clinical forensic interviewer who interviews the victim is not an expert for the purposes of Koerschner, ruling when the clinical forensic interviewer analyzes, and not merely recites, the facts of the interview, and/or states whether there was evidence that the victim was coached or was biased against the defendant, the clinical forensic interviewer will be deemed an expert witness for purposes of applying the Koerschner rule. Based upon the foregoing the Court concludes that appellant was entitled to an independent psychological examination of the victim. The Court further concludes that the district court abused its discretion by excluding evidence of prior false allegations of sexual assault under the standard set forth in Miller v. State [105 Nev. 497, 779 P.2d 87 (1989)].

Griffin v. State, 122 Nev. Adv. Op. No. 63 (July 13, 2006) – The Court affirms an order of the district court denying a motion for credit, ruling that appellant did not demonstrate that he was entitled to the credit sought. Notably, the Court overrules Pangallo v. State [112 Nev. 1533, 930 P.2d 100 (1996)] to the extent that it holds that a claim for presentence credit is a challenge to the computation of time served; the Court concludes that a claim for presentence credit is a challenge to the validity of the judgment of conviction and sentence that may be raised on direct appeal or in a post-conviction petition for a writ of habeas corpus in compliance with the procedural requirements of NRS chapter 34.

Volvo Cars of North America v. Ricci, 122 Nev. Adv. Op. No. 64 (July 13, 2006) – The Court declines two certified questions from the United States District Court under NRAP 5 concerning the admissibility of government and industry standards evidence in a products liability design defect action, refusing to resolve pretrial state law evidentiary issues on the basis that they will have, at best, a speculative impact in determining the underlying case and could not in any sense "be determinative" of the federal action and would therefore not promote judicial efficiency.

State v. Powell, 122 Nev. Adv. Op. No. 65 (July 13, 2006) – The Court reverses a district court order granting post-conviction habeas relief, ruling that the petitioner was not prejudiced by his counsel's deficient performance (reversing the district court's order vacating the death sentence and granting a new penalty hearing).

Cripps v. State, 122 Nev. Adv. Op. No. 66 (July 20, 2006) – The Court affirms a conviction, pursuant to a plea of nolo contendere, of one count of felony nonsupport of children, overruling Standley v. Warden [115 Nev. 333, 990 P.2d 783 (1999)] and prospectively adopting new standards governing the district courts' participation in the plea negotiation process. Specifically, 1) any off-the-record discussions between the judge and the parties relating to a potential plea agreement shall be prohibited; and 2) the Court will apply a bright-line rule prohibiting any judicial participation in the plea negotiation process with one exception: the judge may indicate whether he or she is inclined to accept a sentencing recommendation of the parties. In the event that a judge expresses such an inclination, but later reconsiders and concludes that the recommendation will not be followed, the judge must permit the defendant an opportunity to withdraw the plea and proceed to trial prior to sentencing.

Star Ins. Co. v. Neighbors, 122 Nev. Adv. Op. No. 67 (July 20, 2006) – The Court affirms in part and reverses in part a district court order denying a petition for judicial review in a workers' compensation case, ruling that a workers' compensation insurer may avoid payment of a claim submitted under retroactive coverage procured by employer fraud.

Pantano v. State, 122 Nev. Adv. Op. No. 68 (July 20, 2006) – The Court affirms a jury conviction of one count of sexual assault of a child under 14, upholding the constitutionality of NRS 51.385 facially and as applied based on the United States Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004), by ruling that 1) the admission of child-victim statements through the testimony of others was appropriate since the defendant had an opportunity to cross-examine the declarant and 2) a child-victim's statements to a parent regarding a sexual assault are nontestimonial hearsay since a parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child.

Ford v. State, 122 Nev. Adv. Op. No. 69 (July 20, 2006) – The Court affirms a jury conviction of one count of second-degree murder with the use of a deadly weapon and one count of burglary while in possession of a deadly weapon, ruling that 1) NRS 62C.010(2)(a), the Juvenile Courts statute requiring parental notification that a child is in custody, does not preclude law enforcement interviews of juveniles suspected of criminal misconduct and does not bar eventual admission at trial of voluntary statements taken during such interviews;

2) parental notification or presence during juvenile interviews is only a factor in resolving whether such statements are voluntary. The Court also finds the appellant's other arguments on appeal to be without merit [that the officers unlawfully seized his stocking cap and sweatshirt containing the victim's blood stain, the jury instructions defining murder and manslaughter failed to properly define a reasonable person standard as a juvenile, his warrantless arrest was unconstitutional, the use of the autopsy report and substituted expert violated his right to confrontation, the admission of prior bad acts was an abuse of discretion].

Matter of Estate of Prestie, 122 Nev. Adv. Op. No. 70 (July 20, 2006) – The Court affirms a district court order adopting a probate commissioner's report and recommendation that the decedent's will be revoked as to the respondent, ruling that NRS 133.110 does not permit evidence of an amendment to an inter vivos trust to rebut the presumption of a will's revocation as to an unintentionally omitted spouse.

Capitol Indem. v. State, Dep't Bus. & Indus., 122 Nev. Adv. Op. No. 71 (July 20, 2006) – The Court reverses a district court order dismissing appellant's petition for judicial review, adopting the doctrine of legal subrogation and ruling that a surety is equitably entitled to intervene on behalf of the absent principal at a bond forfeiture hearing. This right is limited, however, to contesting the amount of legally guaranteed loss, to denying the principal's liability, and to asserting any defenses personal to the principal.

Nevada Power Co. v. Public Util. Comm'n, 122 Nev. Adv. Op. No. 72 (July 20, 2006) – The Court affirms in part and reverses in part a district court order denying petitions for judicial review of a decision of the Public Utilities Commission of Nevada (PUCN) determining whether to allow Nevada Power Company to recoup approximately $922 million in energy purchase costs incurred from 1999-2001, ruling that a rebuttable prudence presumption applies to deferred energy accounting applications. Despite the PUCN's failure to properly apply that presumption, the Court concludes that each allowance and disallowance is supported by substantial evidence in the record, except the disallowance concerning Nevada Power's failure to enter into a "Merrill Lynch-type" energy purchase.

McClintock v. McClintock, 122 Nev. Adv. Op. No. 73 (July 20, 2006) – The Court reverses a district court order directing a nunc pro tunc modification of a previously entered divorce decree, ruling that the district court cannot use a nunc pro tunc order to change the date of a divorce decree to a date before the date when the matter was adjudicated.

Kirkpatrick v. State, 122 Nev. Adv. Op. No. 74 (July 20, 2006) – The Court affirms an amended judgment of conviction and order of the district court revoking probation on an original conviction, pursuant to a guilty plea, of one count of conspiracy to commit murder and one count of assault with a deadly weapon, ruling that the NRS 193.168(1) sentencing enhancement for promoting the activities of a criminal gang may be applied to a conviction for conspiracy.

Mack-Manley v. Manley, 122 Nev. Adv. Op. No. 75 (July 20, 2006) – The Court, on consolidated appeals from a divorce decree and a post-decree order modifying the child custody arrangement and awarding attorney fees, rules that a district court is divested of jurisdiction, after an appeal has been perfected, to entertain a motion to modify a child custody arrangement when the custody issue is on appeal.

Blaine Equip. Co. v. State, Purchasing Div., 122 Nev. Adv. Op. No. 76 (July 27, 2006) – The Court reverses in part and vacates in part a district court judgment in an action for declaratory and injunctive relief in a matter involving sales contracts pursuant to the State Purchasing Act (NRS chapter 333), ruling that 1) the district court erred by not sua sponte joining the contracting bidder as a party to the district court proceedings under NRCP 19(a); and 2) the district court does not have the equitable power to affirm the contracts, which contravene the mandatory language of NRS 333.810(1) declaring them void.

Western Tech. v. All-Am. Golf Ctr., 122 Nev. Adv. Op. No. 77 (August 17, 2006) – The Court affirms, reverses and vacates in part an amended district court judgment on a jury verdict in a breach of contract and warranty action, ruling that a party against whom a judgment is rendered in a breach of contract and warranty action may offset that judgment by the amount the prevailing party obtained in a settlement with other parties, since Nevada decisional law, the Uniform Joint Obligations Act (UJOA) and the Restatement (Second) of Contracts provide a basis for an offset in the event no express agreement exists for offset, indemnification, or contribution.

Herbst Gaming, Inc. v. Sec'y of State, 122 Nev. Adv. Op. No. 78 (September 8, 2006) – The Court affirms in part and vacates in part a district court order denying injunctive and declaratory relief with respect to the Nevada Clean Indoor Air Act initiative's placement on the November 2006 ballot, ruling that 1) preelection initiative challenges are properly considered when they allege procedural defects or assert that a measure does not satisfy an explicit constitutional or statutory requirement for initiatives; 2) attacks based on the alleged unconstitutionality of the measure, if it were passed, are not appropriate for preelection review; 3) the Secretary of State must include in his condensation and explanation of this measure a clear statement that the NCIAA would prohibit

smoking in all bars with a food-handling license; and 4) as the district court lacked authority to issue an advisory opinion concerning whether the measure might be interpreted to include hotel and motel rooms.

Nevadans for Prop. Rights v. Sec'y of State, 122 Nev. Adv. Op. No. 79 (September 8, 2006) – The Court affirms in part and reverses in part a district court order denying declaratory and/or writ relief to prevent placement of the Nevada Property Owners' Bill of Rights on the November 2006 general election ballot, ruling that 1) the single-subject requirement on initiative petitions in NRS 295.009 is constitutional; 2) because the Nevada Property Owners' Bill of Rights embraces more than one subject, the initiative violates this statute; 3) because the initiative includes a severability clause and facially and unequivocally pertains to a primary subject—eminent domain—the Court severs and strikes sections 1 and 8 for not pertaining to eminent domain; 4) because initiatives proposing constitutional amendments must propose policy and not direct administrative details, the Court severs and strikes sections 3, 9, and 10 for violating this threshold requirement; and 5) the remainder of the initiative shall proceed to the ballot.

Nevadans for Nevada v. Beers, 122 Nev. Adv. Op. No. 80 (September 8, 2006) – The Court reverses a district court order denying appellants' complaint for injunctive and declaratory relief, seeking to prohibit the Tax and Spending Control for Nevada Initiative from appearing on the November 2006 general election ballot, ruling that since the TASC initiative proposed an expansive constitutional amendment, and because its proponents failed to adhere to Nevada Constitution Article 19, Section 2, by filing a true copy of the initiative petition with the Secretary of State before beginning circulation, the Secretary of State is prohibited from placing the initiative on the ballot.

State v. Colosimo, 122 Nev. Adv. Op. No. 81 (September 14, 2006) – The Court affirms a district court order granting a motion to dismiss an indictment charging respondent with the use of technology to lure children, a violation of NRS 201.560, ruling that, while the statute is constitutional, in order to commit the offense described, a defendant's intended victim must be "less than 16 years of age" and that victim must have actual parents or guardians whose express consent was absent or avoided. Respondent corresponded through the Internet with an undercover police detective posing as a fourteen-year-old girl, arrived at a prearranged meeting place with condoms and lubricant intending to have sex with the girl, and was arrested and charged with violating NRS 201.560. The Court held that because the actual intended victim in this case was not "less than 16 years of age," it was legally impossible for the prosecution to prove that element of the crime charged.

Medina v. State, 122 Nev. Adv. Op. No. 31 (October 5, 2006) (AMENDED OPINION) – The Court affirms a jury conviction on five counts of sexual assault of a victim 65 years or older, one count of battery with intent to commit a crime, victim 65 years or older, and one count of first-degree kidnapping of a victim 65 years or older, ruling that an out-of-court statement made by a rape victim a day after the startling event was admissible under NRS 51.095 since the mental and physical condition of the victim, coupled with the fact that she remained under the stress of excitement caused by the rape, brings her statement within the excited utterance exception to the hearsay rule.

Ruvalcaba v. State, 122 Nev. Adv. Op. No. 82 (October 5, 2006) – The Court affirms a conviction upon a guilty plea of one count of sale of a controlled substance, ruling that a sentencing judge does not necessarily a defendant's right to due process by considering a criminal defendant's status as an illegal alien when determining whether to grant or deny a request for probation, citing Martinez v. State [114 Nev. 735, 961 P.2d 143 (1998)].

Morales v. State, 122 Nev. Adv. Op. No. 83 (October 5, 2006) – The Court reverses a jury conviction on two counts of burglary while in possession of a firearm, one count of conspiracy to commit robbery, three counts of robbery with the use of a deadly weapon, and two counts of possession of a firearm by an ex-felon, ruling that 1) the district court may resort to bifurcation rather than complete severance where the State, in the indictment or criminal information, joins a charge of unlawful possession of a firearm by an ex-felon with other substantive criminal violations [expanding Brown v. State 114 Nev. 1118, 967 P.2d 1126 (1998)] ; and 2) misconduct committed in the case constitutes cumulative error compelling reversal, on the basis that three improper arguments in closing, that the presumption of innocence no longer applied to the defendant, that jurors could have no doubt about defendant's guilt unless they were present during the crimes, and inviting undue jury reliance on the prosecutor's veracity, were made in the context of a case marked by uncertain and equivocal eyewitness testimony that comprised the sole incriminating evidence against defendant.

Harkins v. State, 122 Nev. Adv. Op. No. 84 (October 12, 2006) – The Court affirms a jury conviction of first-degree murder with the use of a firearm, ruling that 1) a statement made by the victim during a 911 telephone call prior to death was a dying declaration and, as such, the statement's admission did not violate the Sixth Amendment right to confrontation as defined in Crawford v. Washington [541 U.S. 36 (2004)]; 2) the statement is non-testimonial since it was made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency; and 3) although the district court erred by giving an

improper self-defense instruction based on apparent danger, the error was harmless beyond a reasonable doubt.

St. Paul Fire v. Employers Ins. Co. of Nev., 122 Nev. Adv. Op. No. 85 (November 9, 2006) – In consolidated appeals of two district court orders granting summary judgment and subsequently awarding damages in cases involving workers injured in work-related automobile accidents, the Court reviews certain relationships between workers' compensation insurance and uninsured/underinsured motorist (UM/UIM) coverage purchased by the employer, ruling that 1) NRS 616C.215(3) grants workers' compensation insurers an independent right to seek subrogation against UM/UIM coverage purchased by an insured employer; and 2) the UM/UIM insurer may unilaterally exclude coverage for such liabilities.

Pascua v. State, 122 Nev. Adv. Op. No. 86 (November 9, 2006) – The Court affirms a jury conviction of one count of first-degree kidnapping with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of murder with the use of a deadly weapon, ruling that dual convictions for kidnapping and murder, arising out of a single course of conduct, may exist if the seizure, restraint, or movement of the victim substantially exceeds that required to complete the associated crime charged.

Valdez v. Employers Ins. Co. of Nev., 122 Nev. Adv. Op. No. 87 (November 9, 2006) – The Court affirms a district court order denying a petition for judicial review in a workers' compensation case, ruling that 1) physician choice under the managed-care system is a procedural and remedial means of administering an injured worker's vested right to workers' compensation; 2) NRS 616C.090(3) applies retroactively to require a worker injured before 1993 to choose a treating physician who is a member of an MCO that has contracted with EICON; and 3) the language of NRS 616C.090 and its legislative history suggest that the legislature intended to make pre-1993 permanent total disability claims subject to managed-care contracts.

Employers Ins. Co. of Nev. v. Daniels, 122 Nev. Adv. Op. No. 88 (November 9, 2006) – The Court reverses a district court order denying a petition for judicial review in an occupational disease case involving the conclusive presumption under NRS 617.457(1) that the heart disease of full-time firefighters who have been employed for five years or more before becoming disabled arises from employment, ruling that, if the firefighter worked at least five years for each of two successive employers before becoming disabled from heart disease, the last injurious exposure rule applies in these circumstances and places responsibility for compensation on the employer in closest temporal proximity to the disabling event.

Archanian v. State, 122 Nev. Adv. Op. No. 89 (November 9, 2006) – The Court affirms a jury conviction of two counts of first-degree murder with the use of a deadly weapon of a victim 65 years of age or older, two counts of robbery with the use of a deadly weapon of a victim 65 years of age or older, and death sentence, ruling that 1) one of the two aggravating circumstances found to support the death sentence must be stricken pursuant to McConnell v. State [120 Nev. 1043, 102 P.3d 606 (2004)]; and 2) after reweighing the remaining aggravating and mitigating evidence, it remains beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance.

City of Las Vegas v. Dist. Ct. (Krampe), 122 Nev. Adv. Op. No. 90 (November 9, 2006) - The Court affirms in part and reverses in part a writ petition challenging the district court's affirmance of the Las Vegas Municipal Court's determinations that portions of the Las Vegas Municipal Code involving erotic dancing are unconstitutionally vague and overbroad, ruling that 1) a municipal court has jurisdiction to determine the constitutionality of a misdemeanor law in a criminal proceeding to enforce that law; and 2) Las Vegas Municipal Code (LVMC) 6.35.100(I), which prohibits certain physical contact between dancers and patrons in erotic dance establishments, is neither unconstitutionally vague nor overbroad.

Sheriff v. Witzenburg, 122 Nev. Adv. Op. No. 91 (November 9, 2006) - The Court reverses a district court order granting a pretrial petition for a writ of habeas corpus ruling that 1) the Sixth Amendment Confrontation Clause and Crawford v. Washington [541 U.S. 36 (2004)] do not apply to a preliminary hearing; and 2) the statutory right to cross-examination, under NRS 171.196(5), is a qualified right, subject to the exception under NRS 171.197 (the case involved a defendant charged with various property crimes against three out-of-state alleged victims; at the preliminary hearing, the State introduced the alleged victims' affidavits in lieu of their personal appearance, as permitted under NRS 171.197)).

Bejarano v. State, 122 Nev. Adv. Op. No. 92 (November 16, 2006) – The Court affirms a district court order district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case, ruling that 1) the robbery felony aggravator found by the jury is invalid pursuant to McConnell v. State [120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004)]; 2) because the receiving-money aggravator also found by the jury was based on the robbery, it too is invalid; and 3) any effect the two aggravators had on the jury's decision to impose a death sentence was harmless beyond a reasonable doubt. NOTE that the Court concludes that McConnell set forth a new rule of substantive law [that it impermissible under the United States and Nevada Constitutions to base an

aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated] that applies RETROACTIVELY.

Rippo v. State, 122 Nev. Adv. Op. No. 93 (November 16, 2006) – The Court affirms a district court order district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case, ruling that 1) three of the aggravating circumstances found by the jury in this case were invalid under McConnell [120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004)] and Bejarano above, because they were based on felonies which were used to support the prosecution's theory of felony murder; 2) a portion of the jury instruction discussing mitigating circumstances was incorrect; 3) three aggravators found by the jury remain valid; and 4) the jury's consideration of the invalid aggravating circumstances and the erroneous instruction were harmless beyond a reasonable doubt.

Kay v. Nunez, 122 Nev. Adv. Op. No. 94 (November 22, 2006) – The Court affirms a district court order denying a petition for judicial review and a petition for a writ of mandamus, challenging the Clark County Board of County Commissioners' authority to waive certain development standards in approving a nonconforming zone change application, ruling that 1) an aggrieved party's challenge to zoning and planning decisions must now be presented by a petition for judicial review under NRS 278.3195, rather than by a petition for a writ of mandamus; 2) NRS 278.315(1) unambiguously grants the Board the authority to enact an ordinance that gives the Planning Commission the power to grant special exceptions; and 3) the waiver of development standards procedure at issue in this appeal is one such exception.

Bacher v. State Engineer, 122 Nev. Adv. Op. No. 95 (November 22, 2006) – The Court reverses district court order denying appellants' petition for judicial review in a water rights case, ruling that 1) while an agent may properly apply for water rights permits on behalf of the actual appropriator based on the ultimate user's need for water; 2) Nevada courts will adopt the anti-speculation doctrine, which requires the agent to have a contractual or agency relationship with the water's appropriator; and 3) even though the agent in this case properly applied for a water rights permit on behalf of the appropriator, the State Engineer failed to properly consider the evidence in determining the need for water in the import basin.

Estes v. State, 122 Nev. Adv. Op. No. 96 (November 30, 2006) – The Court reviews an appeal from a jury conviction of two counts of preventing or dissuading a person from testifying or producing evidence, one count of first-degree kidnapping, two counts of battery with intent to commit a crime, six counts of sexual assault of a minor under 14, two counts of coercion, and two counts of

lewdness with a child under 14, affirms all but five of the convictions entered and remands for further proceedings, ruling that when the prosecution seeks to use a court-ordered psychiatric evaluation to rebut an insanity defense, the prosecution may not utilize the portions of the evaluation containing the defendant's statements that directly relate to culpability for the crimes charged, unless the defendant was first informed of his Fifth Amendment rights and has agreed to waive them [the prosecution may use other portions of the evaluation to rebut an insanity defense].

Marquis & Aurbach v. Dist. Ct., 122 Nev. Adv. Op. No. 97 (November 30, 2006) - The Court reviews petitions for writs of mandamus challenging district court orders confirming a state bar fee dispute arbitration award.

Brent G. Theobald Constr. v. Richardson Constr., 122 Nev. Adv. Op. No. 98 (December 7, 2006) - The Court affirms a district court order dismissing a breach of contract action, confirming that a lawsuit dismissed under NRCP 41(e), unless dismissed without prejudice, is res judicata to a future lawsuit between the same plaintiff and defendant involving the same claims for relief, clarifying and distinguishing Home Savings Ass'n v. Aetna Casualty & Surety, 109 Nev. 558, 854 P.2d 851 (1993) (involving consolidated actions and an appeal of the final judgment, challenging an earlier NRCP 41(e) dismissal order in one of the cases).

State v. Rincon, 122 Nev. Adv. Op. No. 99 (December 7, 2006) – The Court vacates a district court order granting respondent's motion to suppress evidence, ruling that 1) the fact that a motorist is driving slowly does not, by itself, create a reasonable suspicion justifying an investigative stop; 2) while reasonable suspicion is not a stringent standard, there must be additional indicia of erratic driving or unusual behavior before a reasonable suspicion arises justifying an investigative stop; and 3) where no reasonable suspicion exists, an inquiry stop may nonetheless be justified under the community caretaking doctrine when a police officer has an objectively reasonable belief that a slow driver is in need of emergency assistance.

Calvin v. State, 122 Nev. Adv. Op. No. 100 (December 14, 2006) – The Court affirms a conviction by guilty plea of two counts of first-degree murder with the use of a deadly weapon, ruling that 1) NRS 178.400, Nevada's standard for a defendant's competency to stand trial, conforms to the standard set out by the United States Supreme Court in Dusky v. United States, 362 U.S. 402 (1960); 2) an accurate competency evaluation requires consideration of a wide scope of relevant evidence at every stage of the competency proceeding, including initial doubts as to the defendant's competency, the experts' evaluation, and the hearing after the evaluation; 3) all evidence must still be relevant to the ultimate

issues of whether the defendant understands the nature of the proceedings against him and can assist his counsel in his defense; and 4) relevant evidence may also be excluded under NRS 48.035(2) if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Rocker v. KPMG LLP, 122 Nev. Adv. Op. No. 101 (December 21, 2006) – The Court vacates in part and reverses in part a district court order, certified as final under NRCP 54(b), granting respondent's motion to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted, ruling that 1) Nevada courts shall apply the relaxed pleading requirements that the federal courts utilize under Federal Rule of Civil Procedure 9(b) for cases when facts necessary for the plaintiff to plead a cause of action for fraud with particularity under NRCP 9(b) are peculiarly within the defendant's knowledge or possession; 2) in such cases, if the plaintiff pleads specific facts giving rise to a strong inference of fraud, the plaintiff should have an opportunity to conduct discovery and amend his complaint to include the particular facts.

City of N. Las Vegas v. Dist. Ct., 122 Nev. Adv. Op. No. 102 (December 21, 2006) - The Court denies a writ petition challenging a district court order granting writs below with respect to an administrative decision regarding a special use permit, ruling that 1) since under NRS 2.090(2) a party may appeal from an order granting a writ of mandamus only when that order finally resolves all of the issues in the case, and the order in this case left issues pending, consideration of this writ petition is appropriate; 2) as to who may administratively challenge a planning commission special use permit decision, any person who satisfies a relevant local ordinance's aggrievement standards may appeal to the governing body in accordance with the appropriate procedures, even if that person did not appear before the planning commission; and 3) as to how that administrative challenge should proceed and whether it can be abandoned, even after aggrievement is established and the appeal proceeds on the merits, the appeal nonetheless may be abandoned if the appellant does not prosecute it. In this case, the administrative appellant never satisfied the local ordinance's aggrievement standards by demonstrating that her property rights might be affected by the planning commission's decision. Accordingly, the administrative appeal was never perfected and the City Council was without authority to proceed with it. As the City Council nevertheless proceeded with the appeal and ruled on its merits, the district court did not manifestly abuse its discretion in directing the City Council to vacate its decision, and we deny this petition for extraordinary relief.

Republic Silver State Disposal, 122 Nev. Adv. Op. No. 103 (December 21, 2006) – The Court affirms a district court order granting summary judgment in a negligence case, based on the Nevada Industrial Insurance Act's exclusive

remedy provision (NRS 616A.0200, ruling that 1) contractors working, ultimately, under an NRS Chapter 624 license are entitled under NRS 616B.603 to NIIA immunity for claims arising from employee injuries incurred in the scope of that work; 2) correspondingly, property owners who hire NRS Chapter 624-licensed contractors are, similarly, entitled to NIIA immunity from suits concerning industrial injuries arising out of risks associated with that licensed work.

American Home Assurance Co. v. Dist. Ct., 122 Nev. Adv. Op. No. 104 (December 21, 2006) – The Court denies a writ petition challenging a district court order that denied petitioner's motion to intervene in the underlying personal injury action, ruling that a workers' compensation insurer may intervene in an injured worker's litigation to protect its right to reimbursement only if it meets certain requirements, which include showing that the injured worker cannot adequately represent the insurer's interest in the subject matter of the litigation, and that the insurer here failed to make the required showing (overruling the case of State Industrial Insurance System v. District Court, 111 Nev. 28, 888 P.2d 911 (1995), which established an absolute right for an insurer to intervene).

Millen v. Dist. Ct., 122 Nev. Adv. Op. No. 105 (December 21, 2006) – The Court grants a writ petition challenging a district court's oral pronouncement reflected in the clerk's minutes that disqualified petitioner's counsel, ruling that 1) judges may use recusal lists for case assignment purposes provided such lists are created and maintained in a manner consistent with the objective reasons specified in the Nevada Code of Judicial Conduct; 2) when a judge's duty to sit conflicts with a client's right to choose counsel, the client's right generally prevails, except when the lawyer was retained for the purpose of disqualifying the judge and obstructing management of the court's calendar; and 3) here, because petitioner's attorney was improperly listed on the district judge's recusal list and petitioner's attorney was not chosen in order to disqualify the assigned judge and obstruct the management of the court's calendar, the district court erred by disqualifying petitioner's attorney.

Rosas v. State, 122 Nev. Adv. Op. No. 106 (December 21, 2006) – The Court reverses a jury conviction of battery upon an officer, ruling that since under NRS 175.501 a defendant may be convicted of a lesser offense that is necessarily included in the charged offense, a defendant is entitled to a jury instruction on his or her theory of the case as long as there is some evidence to support it, regardless of who introduces the evidence and regardless of what other defense theories may be advanced (overruling prior cases insofar as they have required a defendant to present a defense or evidence consistent with or to admit culpability for a lesser-included offense in order to obtain an instruction on a lesser-included offense).

Mitchell v. State, 122 Nev. Adv. Op. No. 107 (December 21, 2006) – The Court affirms in part and reverses in part a district court's denial of a post-conviction petition for a writ of habeas corpus, ruling that 1) appellant's conviction for attempted murder with the use of a deadly weapon as an aider and abettor should be vacated pursuant to Sharma v. State [118 Nev. 648, 56 P.3d 868 (2002)] in light of the State's concession at trial that appellant lacked the specific intent to kill (on the basis that Sharma clarified the law and therefore applies to cases that were final when it was decided); 2) appellant's claim that he is actually innocent of the deadly weapon enhancement to his robbery conviction is barred by the law of the case; and 3) appellant's claim that the district court erred by failing to sua sponte instruct the jury on the definition of the use of a deadly weapon is procedurally barred.

Flamingo Hilton v. Gilbert, 122 Nev. Adv. Op. No. 108 (December 28, 2006) – The Court affirms a district court order denying a petition for judicial review in a workers' compensation matter, ruling that a workers' compensation claimant's administrative appeal is not barred by his failure to designate, in his appeal form, the first notice informing him of the claim's closure, because the claimant received two superseding notices of claim closure, and because his appeal was timely as to any of the three notices.

Matter of Petition of Phillip A. C., 122 Nev. Adv. Op. No. 109 (December 28, 2006) - The Court reverses a district court order vacating the adoption of a minor child, ruling that 1) a tribal enrollment officer's affidavit may be used to establish that a child is a Native American child and subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63; 2) a Native American tribe has independent standing under the ICWA to challenge the voluntary adoption of a Native American child; and 3) the failure of the district court to permit the adoptive parent to present evidence rebutting the enrollment officer's affidavit was reversible error.

Washoe Med. Ctr. v. Dist. Ct., 122 Nev. Adv. Op. No. 110 (December 28, 2006) – The Court grants a writ petition challenging a district court order that denied petitioner's motions to dismiss a complaint and to strike the first amended complaint in a medical malpractice action, ruling that under NRS 41A.071, a complaint for medical malpractice filed without a supporting medical expert affidavit is void ab initio and must be dismissed, because a void complaint does not legally exist, it cannot be amended, NRCP 15(a) does not apply in this instance, and an NRS 41A.071 defect cannot be cured through amendment.

In re Christensen, 122 Nev. Adv. Op. No. 111 (December 28, 2006) – The Court answers questions certified from the United States Bankruptcy Court concerning the interpretation of NRS 21.090(1)(g), Nevada's wage garnishment exemption statute, which allows a debtor to exempt from execution a certain percentage of

the debtor's disposable earnings, ruling that 1) NRS 21.090(1)(g), in both its original and amended form, exempts the proceeds of any and all deposits of earnings in a debtor's bank account; 2) once exempt, the proceeds of exempt earnings retain the exemption even if commingled with nonexempt funds unless tracing is not possible or the proceeds take on the form of an investment; and 3) FIFO is the appropriate method to trace exempt proceeds.

Summers v. State, 122 Nev. Adv. Op. No. 112 (December 28, 2006) - The Court affirms a jury conviction of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and assault with the use of a deadly weapon, and from sentences of life in prison without the possibility of parole after a capital penalty hearing, ruling that the Confrontation Clause of the Sixth Amendment to the United States Constitution and the United States Supreme Court's holding in Crawford v. Washington (541 U.S. 36 (2004)) do NOT apply to evidence admitted during a capital penalty hearing.

Johnson v. State, 122 Nev. Adv. Op. No. 113 (December 28, 2006) – The Court affirms a death sentence after a new penalty hearing, ruling that the Confrontation Clause of the Sixth Amendment to the United States Constitution and the United States Supreme Court's holding in Crawford v. Washington (541 U.S. 36 (2004)) do NOT apply to the selection phase of a bifurcated capital penalty hearing (applying Summers v. State, 122 Nev. Adv. Op. No. 112 (December 28, 2006)).

Thomas v. State, 122 Nev. Adv. Op. No. 114 (December 28, 2006) – The Court affirms a sentence of death following a second penalty hearing after remand, upholding the constitutionality of Nevada's death penalty scheme, reaffirming the inapplicability of the Confrontation Clause during a capital penalty hearing, and ruling that none of the arguments on appeal establish reversible error.

Lioce v. Cohen, 122 Nev. Adv. Op. No. 115 (December 28, 2006) – On consolidated appeals from district court orders in cases involving similar allegations of attorney misconduct, the Court substantially revises its attorney misconduct jurisprudence, overruling Barrett v. Baird (111 Nev. 1496, 908 P.2d 689 (1995)) and DeJesus v. Flick (116 Nev. 812, 7 P.3d 459 (2000)), and limiting Ringle v. Bruton (120 Nev. 82, 95-96, 86 P.3d 1032, 1040 (2004)). Any review on appeal for attorney misconduct is generally precluded unless the record showed a timely and proper objection and a request that the jury be admonished. For objected-to and admonished misconduct, a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect; when the district court finds that the objection and admonishment were insufficient to remove the attorney misconduct's effect, a new trial is warranted. For objected-to and

unadmonished misconduct, a party moving for a new trial based on that purported attorney misconduct must first demonstrate that the district court erred by overruling the party's objection, and if so, the district court must then consider whether an admonition to the jury would likely have affected the verdict in favor of the moving party. For repeated or persistent objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct; the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent. For unobjected-to attorney misconduct, the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists in that the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different. In deciding a motion for a new trial based upon attorney misconduct, the district court must make specific findings, and on appeal the Court will give deference to the district court's factual findings and application of the standards to the facts.

State, Bd. of Equalization v. Bakst, 122 Nev. Adv. Op. No. 116 (December 28, 2006) – The Court affirms a district court order granting petition for judicial review and complaint for relief under NRS 361.420 and overturning a decision of the Nevada State Board of Equalization, ruling that because NRS 361.260(7) did not permit the Washoe County Assessor to adopt standards or methods of land valuation not approved by the Nevada Tax Commission, the use of certain disputed methodologies was improper under the Nevada Constitution's requirement that property be taxed according to a uniform and equal rate of assessment.

Matter of Parental Rights as to A.J.G., 122 Nev. Adv. Op. No. 117 (December 28, 2006) – The Court affirms a district court order terminating appellant's parental rights, ruling that 1) the State in seeking termination of parental rights does not have a burden to demonstrate that an adoptive placement for a child exists; 2) when the State has established the presumption under NRS 128.109(2) that it is in the child's best interest for the parent's rights to be terminated, it is the parent's burden to adduce evidence of the child's desires regarding termination of parental rights under NRS 128.107(2) as a consideration for the district court in rebutting the presumption; and 3) substantial evidence supports the district court's termination of parental rights in this instance.

Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. Adv. Op. No. 118 (December 28, 2006) – The Court reverses a district court judgment entered on a

jury verdict in a constructional defect case and an order awarding interest, costs, and attorney fees, ruling that 1) use of a comparative negligence jury instructions is only appropriate in constructional defect cases that properly assert a negligence claim under Shuette v. Beazer Homes Holdings Corp. (121 Nev. 837, 124 P.3d 530 (2005)); 2) use of special verdict forms in constructional defect cases is necessary when there are differing theories of liability and defenses directed to one, but not all, of the liability theories.

Clark County Sch. Dist. v. Bundley, 122 Nev. Adv. Op. No. 119 (December 28, 2006) – The Court reverses a district court order denying judicial review in an unemployment compensation matter, ruling that when an employer asserts that a former employee's misconduct disqualifies her from receiving unemployment benefits, 1) the employer bears the burden of demonstrating that the employee's discharge was due to disqualifying misconduct, 2) the employer may do this by making an initial showing of willful misconduct related to the employment, and 3) to avoid being disqualified from receiving benefits, the former employee must then demonstrate that the nature of the misconduct was not of the type for which disqualification is warranted.

Linthicum v. Rudi, 122 Nev. Adv. Op. No. 120 (December 28, 2006) – The Court affirms a district court order dismissing an action concerning a revocable inter vivos trust and a post-judgment order awarding attorney fees and costs, ruling that a beneficiary lacks standing to challenge the settlor's lifetime amendments because the beneficiary's interest is contingent; instead, to challenge the settlor's capacity to make amendments, revocable inter vivos trust beneficiaries must follow the procedures set forth in Nevada's guardianship statutes, NRS Chapter 159.

Santana v. State, 122 Nev. Adv. Op. No. 121 (December 28, 2006) – The Court reverses a jury conviction on 19 counts of coercion, ruling that in determining whether there has been an immediate threat of physical force under NRS 207.190, a reasonable person's viewpoint should be the focus of the inquiry, and while the jury can and should consider the victims' testimony, the jury remains responsible for determining whether the threat was immediate, future, or incapable of being performed (extending Deshler v. State, 106 Nev. 253, 256, 790 P.2d 1001, 1003 (1990)).