

2007 Nevada Supreme Court Opinion Digest

Rosas v. State, 122 Nev. Adv. Op. No. 106 (December 21, 2006 - as amended January 24, 2007) – The Court issues an amended opinion reversing 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).

Austin v. State, 123 Nev. Adv. Op. No. 1 (February 15, 2007) - The Court affirms a jury conviction of two counts of statutory sexual seduction, ruling that under NRS 176A.110(1)(a) and NRS 176.13, for a defendant convicted of felony statutory sexual seduction, the psychosexual evaluation and certification needed for probation can be prepared by a clinical social worker who is trained in conducting psychosexual evaluations.

O'Neill v. State, 123 Nev. Adv. Op. No. 2 (March 8, 2007) - The Court affirms in part and reverses in part a jury conviction of three counts of possession of a forged instrument, and an adjudication of habitual criminality, ruling in pertinent part that Nevada's habitual offender statute, NRS 207.010, does not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by requiring "judicial fact-finding" beyond the mere fact of prior convictions, but remanding for entry of an amended judgment of conviction vacating the special sentence of lifetime supervision since the defendant was not convicted of a crime warranting this sentence under NRS 176.0931.

In re Contrevo, 123 Nev. Adv. Op. No. 3 (March 8, 2007) – The Court responds to a certified question submitted by the United States Bankruptcy Court for the District of Nevada, ruling that an NRS 17.150 abstract judgment lien cannot attach to homestead property that is fully exempt, both at the time that the judgment lien is recorded and at the time that the homestead property is sold, and that such a lien is void and ineffective as to the exempt equity in such property.

Matter of Eric L., 123 Nev. Adv. Op. No. 4 (March 8, 2007) – The Court affirms a juvenile court order denying a petition to certify respondent for criminal proceedings as an adult, ruling 1) while juveniles do have a constitutional right to a speedy trial in juvenile proceedings, the State's right to appeal an order denying certification does not abridge that right; 2) the State's right to appeal a denial of certification does not abridge a juvenile's statutory right to final disposition within one year under NRS 62D.310 because that one-year period is tolled while the matter is on appeal; and 3) in this case, the juvenile court did not

abuse its discretion in denying the State's certification petition since that the juvenile court properly conducted its analysis under the discretionary arm of NRS 62B.390 as well as the Seven Minors' (99 Nev. at 435, 664 P.2d at 952) matrix setting forth the factors to consider when determining certification petitions.

Labor Comm'r v. Littlefield, 123 Nev. Adv. Op. No. 5 (March 8, 2007) – The Court affirms a district court order granting a preliminary injunction in a prevailing wage dispute, ruling that with respect to the Labor Commissioner's annual prevailing wages list, he must comply with the Administrative Procedures Act (NRS chapter 233B) before adding, deleting, or substantially modifying worker classifications.

Nevada Yellow Cab Corp. v. Dist. Ct., 123 Nev. Adv. Op. No. 6 (March 8, 2007) – The Court denies a writ petition challenging a district court order disqualifying an attorney and his firm as counsel in an insurance bad faith action, expressly adopting the majority rule that counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict.

Valdez v. Employers Ins. Co. of Nev., 122 Nev. Adv. Op. No. 87 (March 13, 2007) – The Court grants a rehearing and withdraws its prior opinion in Valdez v. Employers Ins. Co. of Nev., 122 Nev. ____, 146 P.3d 250 (November 9, 2006), affirming a district court order denying a petition for judicial review in a workers' compensation case.

Hightower v. State, 123 Nev. Adv. Op. No. 7 (April 5, 2007) – The Court affirms a jury conviction of one count each of gross misdemeanor conspiracy to commit larceny, gross misdemeanor unlawful taking of a motor vehicle, and felony conspiracy to commit robbery, ruling that, absent unusual circumstances, incarcerated witnesses should not be compelled to appear at trial in the distinctive attire of a prisoner, but that in this instance the error was harmless beyond a reasonable doubt.

Richardson Constr. v. Clark Cty. Sch. Dist., 123 Nev. Adv. Op. No. 8 (April 12, 2007) – The Court affirms a district court order dismissing a public works bidder dispute, ruling that NRS 338.1381, which provides for a hearing for an applicant whose public works application has been rejected and for judicial review, does not create a private cause of action.

Byford v. State, 123 Nev. Adv. Op. No. 9 (April 12, 2007) – The Court vacates a district court order denying a postconviction petition for a writ of habeas corpus, ruling that after the Court's vacatur and remand of the district court's prior order denying postconviction relief, the district court should have reconsidered appellant's claims as instructed, conducted an evidentiary hearing if necessary, issued a new ruling, and either drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order.

Bero-Wachs v. Law Office of Logar & Pulver, 123 Nev. Adv. Op. No. 10 (May 3, 2007) - The Court affirms in part and reverses in part a district court order adjudicating an attorney's lien, and denies a consolidated writ petition for a writ by the attorney, challenging the same order two issues regarding attorney's liens, ruling that 1) an attorney's lien does not attach to property awarded in a divorce decree that is exempt from execution by a creditor; and 2) an attorney cannot include a forensic accountant's fees in his attorney's lien if the client entered into an independent contract with the accountant to pay for the accountant's fees.

Silver State Elec. v. State, Dep't of Tax., 123 Nev. Adv. Op. No. 11 (May 3, 2007) – The Court affirms a district court order dismissing a petition for judicial review of a tax commission decision, ruling that NAC 360.452 permissibly requires a responsible person to personally guarantee an agreement amount required by NRS 360.395(1) and does not exceed statutory authority conferred under NRS chapter 360. [NRS 360.395 directs a person to pay a tax determination amount before seeking judicial review of a final Nevada Tax Commission decision. In lieu of immediately paying the determination amount, however, NRS 360.395 allows the entity to enter into an agreement to pay that amount at a later date. The type of agreement permitted under this statute is further described by regulation, NAC 360.452.]

Savage v. Pierson, 123 Nev. Adv. Op. No. 12 (May 3, 2007) – The Court, in response to a certified question submitted by the United States Bankruptcy Court for the District of Nevada pursuant to NRAP 5, concludes that a security deposit in a residential lease is not exempt from the claim of creditors under either the homestead exemption of NRS 21.090(1)(l) or the dwelling exemption of NRS 21.090(1)(m).

Monroe v. Columbia Sunrise Hosp., 123 Nev. Adv. Op. No. 13 (May 17, 2007) – The Court affirms in part and reverses in part a district court order dismissing a medical malpractice action under NRCP 41(e), ruling that because the district court's order of summary judgment constituted a trial of the entire action between Monroe and Sunrise Hospital, reversal of that portion of the district court's order dismissing Monroe's individual claims against Sunrise Hospital is warranted, while dismissal of James' claims against Sunrise Hospital with prejudice is affirmed, as the prior order granting partial summary judgment did not constitute a "trial" under NRCP 41(e), and the statute of limitations for his claims had expired.

Edwards v. Ghandour, 123 Nev. Adv. Op. No. 14 (June 7, 2007) – The Court affirms a district court order granting respondents' motion to dismiss under NRCP 41(e) in a fraud case and from district court orders dismissing, on the basis of claim preclusion, a subsequent action and awarding attorney fees and costs, ruling that 1) Rickard v. Montgomery Ward & Co., 120 Nev. 493, 96 P.3d 743 (2004), holding that a defendant's bankruptcy operates to toll NRCP 41(e)'s five-year period for bringing an action to trial, applies only to the particular defendant

or defendants who have filed for bankruptcy protection, not to defendants who are not bankruptcy debtors; and (2) that an appeal from the district court's final judgment does not affect that judgment's finality for purposes of claim preclusion.

McGrath v. State, Dep't of Pub. Safety, 123 Nev. Adv. Op. No. 15 (June 7, 2007) – The Court affirms a district court order denying a petition for judicial review in a workers' compensation case, ruling that a workers' compensation claimant who alleges that she has suffered extreme and unusual stress on the job is required to pinpoint a discrete, identifiable event giving rise to the stress under NRS 616C.180.

Schmidt v. Washoe County, 123 Nev. Adv. Op. No. 16 (June 14, 2007) - On consolidated appeals from district court orders dismissing complaints in open meeting law actions, the Court affirms the dismissals, ruling that 1) under Nevada's Open Meeting Law (NRS Chapter 241) a public body may remove an item from its meeting agenda at any time; and 2) regularly scheduled caucus meetings can qualify as "special" meetings under NRS 244.090 if "there is sufficient business to come before the board."

Johnson v. State, 123 Nev. Adv. Op. No. 17 (June 14, 2007) – The Court affirms district court order denying a postconviction petition for a writ of habeas corpus, ruling that a defendant may be convicted of attempting to lure a child under NRS 201.560 when the "child" is actually an undercover law enforcement officer posing on the Internet as a child. NOTE – This statute has been amended by Assembly Bill 72 to provide that the section is violated if the perpetrator believes the victim to be a child, regardless of whether the victim is actually a child.

Arata v. Faubion, 123 Nev. Adv. Op. No. 19 (June 28, 2007) – The Court affirms in part and reverses in part a judgment entered upon a jury verdict in a personal injury action and from an order denying a motion for a new trial, ruling that NRS 41.440, which imposes vicarious liability on motor vehicle owners who loan their vehicles to immediate family members, is rationally related to a legitimate governmental purpose and, thus, survives a constitutional challenge.

Matter of Discipline of Droz, 123 Nev. Adv. Op. No. 20 (June 28, 2007) – The Court approves pursuant to SCR 105(3) a Southern Nevada Disciplinary Board hearing panel's recommendation for professional discipline against disbarred Utah attorney Paul Droz.

Valdez v. Employers Ins. Co. of Nev., 123 Nev. Adv. Op. No. 21 (June 28, 2007) – The Court on rehearing a district court order denying a petition for judicial review in a workers' compensation case, ruling that because NRS 616C.090 is procedural and remedial, it applies retroactively to the injured worker's 1987 claim for permanent total disability benefits.

Callie v. Bowling, 123 Nev. Adv. Op. No. 22 (June 28, 2007) – The Court vacates a district court amended domesticated foreign judgment, ruling that a judgment

creditor in a domesticated foreign judgment may not add a nonparty to a final judgment, under the alter ego doctrine, simply by moving to amend the judgment, because such a procedure violates the due process rights of the nonparty whom the creditor seeks to add. Instead, to observe the requisite attributes of due process, a judgment creditor who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego.

Schuster v. Dist. Ct., 123 Nev. Adv. Op. No. 23 (June 28, 2007) – The Court denies a petition for a writ of mandamus or prohibition seeking dismissal of an indictment, ruling that Nevada's statutory scheme regulating grand juries (NRS 172.105-.271) does not impose an independent, mandatory duty upon the State to instruct the grand jury on the legal significance of exculpatory evidence.

Rose v. State, 123 Nev. Adv. Op. No. 24 (July 26, 2007) – The Court affirms a jury conviction of twenty counts of sexual assault against a minor under the age of fourteen, ruling in pertinent part that 1) the conviction was supported by sufficient evidence even though the child victim's testimony did not specify the exact number of instances of assault nor separately describe each of the instances with particularity, but rather specified that the defendant assaulted her nearly every time she spent the night at his house, that he touched her vagina with his fingers more than ten times and with his tongue more than ten times, and graphically detailed the defendant's actions (distinguishing LaPierre v. State, 108 Nev. 528, 836 P.2d 56 (1992)); and 2) the defendant was not unconstitutionally excluded from jury voir dire when he was excluded from bench conferences with certain prospective jurors regarding their inability to be fair and impartial because they had previously been sexually assaulted or had friends or family that had been accused of sexual assault, since it was not demonstrated that his absence from the bench conferences prejudiced him in any way and those jurors were dismissed because they could not be fair and impartial.

Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. Adv. Op. No. 25 (July 26, 2007) – The Court reverses a district court order granting summary eviction and a writ of restitution and ejectment, ruling that 1) the standard of review of a district court order granting summary eviction is the same as the standard for review of an order granting summary judgment; and 2) summary eviction under NRS 40.253(6) was not appropriate in this case because there is a legal defense based upon unresolved issues of material fact.

Nelson v. Heer, 123 Nev. Adv. Op. No. 26 (July 26, 2007) – The Court affirms in part and reverses in part an amended district court judgment on a jury verdict in a real property action and an order denying a motion for a new trial, ruling that under NRS 113.140, which requires a seller of residential property to disclose to potential buyers only those defects of which the seller is aware, because the appellant had prior water damage repaired and was not aware of the presence of any elevated amounts of mold, she did not have a duty under NRS Chapter 113 to disclose the prior water damage or the possible presence of mold.

Herup v. First Boston Financial, 123 Nev. Adv. Op. No. 27 (July 26, 2007) – The Court reverses a final judgment in a breach of contract and fraudulent transfer action arising out of the sale, repossession, and resale of a small business, ruling that the Uniform Fraudulent Transfer Act (UFTA), NRS Chapter 112, requires an objective determination of whether the transferee knew or should have known of the debtor's fraudulent purpose in transferring the assets.

Manwill v. Clark County, 123 Nev. Adv. Op. No. 28 (July 26, 2007) – The Court reverses a district court order denying judicial review in an occupational disease case, ruling that the conclusive presumption entitling firefighters with heart disease to occupational disease benefits under NRS 617.457(1) applies to a claimant who contracts heart disease before completing the five-year vesting period, but whose date of disablement from the heart disease takes place after the five-year period has concluded.

Halverson v. Hardcastle, 123 Nev. Adv. Op. No. 29 (July 27, 2007) – The Court grants in part and denies in part Clark County District Court Judge Halverson's petition for writ of quo warranto challenging Chief Judge Hardcastle's authority to require another district judge to meet with a committee of judges, to remove and reassign that judge's criminal caseload, and to temporarily bar that judge from entering the courthouse, ruling that Chief Judge Hardcastle's motives, need not be examined as long as she acts in accordance with the rules and within the scope of her inherent authority and does not improperly interfere with Judge Halverson's duties to independently exercise her judicial decision-making functions, the Nevada Commission on Judicial Discipline's authority over disciplinary matters, or this court's authority, through its chief justice, as administrative head of the court system. The Court concludes that 1) because Chief Judge Hardcastle's actions in appointing a three-judge committee and in removing Judge Halverson's criminal cases constituted a proper exercise of her administrative authority, a writ of quo warranto is not warranted to address those issues; and 2) with respect to the May 10 order banning Judge Halverson from the justice center until she cooperates, Chief Judge Hardcastle overstepped her authority.

Marcuse v. Del Webb Communities, 123 Nev. Adv. Op. No. 3 (August 2, 2007) – The Court reverses two district court orders dismissing constructional defect actions and denying NRCP 60(b) relief, ruling that 1) unnamed class members in a constructional defect class action case have standing to object to a proposed settlement and to challenge the district court's approval of the settlement in an appeal from the final judgment; and 2) the district court did not abuse its discretion in approving the settlement in this case; and 3) the district court erred when it dismissed the appellants' second action under the doctrines of res judicata and collateral estoppel, because the respondent represented that the appellants could file a second action for their claims that exceeded the constructional defect class action's scope, and therefore respondent is judicially

estopped from arguing that the action should be dismissed on res judicata grounds.

Gallegos v. State, 123 Nev. Adv. Op. No. 31 (August 2, 2007) – The Court reverses a jury conviction of one count of unlawful possession of a firearm, ruling that NRS 202.360(1)(b) is unconstitutionally vague because it fails to define the term “fugitive from justice.”

State v. Ruscetta, 123 Nev. Adv. Op. No. 32 (August 2, 2007) – The Court vacates a district court order granting respondent’s motion to suppress evidence, clarifies State v. Johnson, 116 Nev. 78, 993 P.2d 44 (2000), concludes that the proper analysis in cases involving consensual vehicular searches is a traditional objective reasonableness approach, which requires an examination of the totality of the circumstances, and orders the district court on remand to enter written findings of fact and conclusions of law when determining whether the inspecting officer in this instance exceeded the scope of the respondent’s consent when the officer moved the unsecured center console of respondent’s vehicle.

Witherow v. State, Bd. of Parole Comm’rs, 123 Nev. Adv. Op. No. 33 (September 20, 2007) – The Court affirms a district court order dismissing a complaint that challenged a parole board proceeding under Nevada’s Open Meeting Law, ruling that parole hearings conducted by the Nevada Board of Parole Commissioners are exempt from the Open Meeting Law because the hearings are quasi-judicial proceedings.

Caballero v. Dist. Ct., 123 Nev. Adv. Op. No. 34 (September 20, 2007) – The Court grants a pro per writ petition challenging a district court order that affirmed a justice court order dismissing petitioner’s small claims action, ruling that a justice court is authorized, under both its inherent authority and JCRCP 43(f), to allow a volunteer interpreter to assist a non-English speaking litigant, and when a volunteer interpreter is not available, to appoint a state-registered interpreter and to determine any compensation.

Nay v. State, 123 Nev. Adv. Op. No. 35 (September 20, 2007) - The Court affirms in part and reverses in part a jury conviction of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon, ruling that for purposes of the first-degree felony-murder statute, the intent to commit the predicate enumerated felony must have arisen before or during the conduct resulting in death. The Court’s further rules that the district court in this case committed reversible error with respect to the first-degree murder conviction in refusing to so instruct the jury, as the defense had requested, and that first-degree murder conviction is reversed.

Clark County Dist. Att’y v. Dist. Ct., 123 Nev. Adv. Op. No. 36 (September 20, 2007) – The Court grants a writ petition challenging a juvenile court order compelling the Clark County Department of Family Services to remove a foster

child from a foster family home and place the child in the home of the paternal relatives, ruling that, upon determining that the statutory familial preference (NRS 432B.550) applies, a district court must, within its discretion, further determine whether placement with family members, over a suitable foster family, is in the child's best interest, consistent with Matter of Guardianship of N.S., 122 Nev. 305, 130 P.3d 657 (2006).

Westpark Owners' Ass'n v. Dist. Ct., 123 Nev. Adv. Op. No. 37 (September 20, 2007) – The Court grants a writ petition challenging a district court order granting partial summary judgment in a declaratory relief action concerning Nevada residential constructional defect law, ruling that condominium units that were occupied on a rental basis for seven years before sale were not “new” under NRS 40.615, and that the remedies of NRS Chapter 40 could therefore only apply to construction defect claims for those units arising from alterations or repairs to the units immediately prior to sale.

Nanopierce Tech. v. Depository Trust, 123 Nev. Adv. Op. No. 38 (September 20, 2007) – The Court affirms a district court order dismissing a securities fraud action, ruling that all of appellants' causes of action are preempted by federal enactments in the area of clearing and settling securities transaction (section 17A of the Securities Exchange Act).

Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. Adv. Op. No. 39 (October 4, 2007) – The Court reverses a district court judgment on a jury verdict in a construction contract and tort action, ruling that 1) appellant Clark County School District (CCSD) cannot waive the statutory damages limitation under NRS 41.035 regardless of whether it is raised as an affirmative defense in its answer; 2) the \$50,000 cap applies on a per-person, per-claim basis and “claim” means “cause of action” or a “per incident or occurrence” standard [citing County of Clark v. Upchurch, 114 Nev. 749, 756, 961 P.2d 754, 759 (1998)]; 3) under the “catchall” provision of NRCP 8(c), non-delineated defenses must be affirmatively pleaded only if they raise new facts and arguments that would defeat the plaintiff's claims even if all allegations in the complaint were true; and 4) since several of CCSD's pleaded affirmative defenses responded to the plaintiff's prima facie case and were not true affirmative defenses, the district court erroneously precluded the jury from considering evidence offered to support those arguments.

Leven v. Frey, 123 Nev. Adv. Op. No. 40 (October 11, 2007) – The Court reverses a proper person appeal from a district court order denying appellant's motion to declare an expired judgment void due to improper renewal, ruling that 1) the proper procedure for judgment renewal under NRS 17.214 requires the timely filing of an affidavit, timely recording of the affidavit (if the judgment to be renewed was recorded), and timely service of the affidavit to successfully renew a judgment; 2) the statute requires strict compliance; and 3) since respondents did not strictly comply with all of these requirements, the district court improperly denied appellant's motion to declare void the previous judgment, which had expired.

Arnold v. Kip, 123 Nev. Adv. Op. No. 41 (October 11, 2007) – The Court affirms a district court order dismissing a medical malpractice action, ruling that 1) a defendant who moves for dismissal because a plaintiff has failed to timely file a case conference report under NRCP 16.1(e)(2) does not need to demonstrate prejudice and the district court does not need to determine whether the defendant has suffered prejudice because of the delay; and 2) arguments made in a motion for reconsideration may properly be considered on appeal from the final judgment if the motion and order are part of the record on appeal (clarifying prior case law).

Ryan v. Dist. Ct., 123 Nev. Adv. Op. No. 42 (October 11, 2007) – The Court grants in part a writ petition challenging a district court's order denying petitioner's motion to substitute counsel, ruling that there is a strong presumption in favor of a non-indigent criminal defendant's right to choose counsel and, therefore, when a non-indigent criminal defendant's choice of counsel results in dual or multiple representation of clients with potentially conflicting interests, the defendant may waive the right to conflict-free counsel. An attorney or firm attempting to engage in dual or multiple representation of two or more criminal defendants must advise the defendants of their right to seek independent counsel to advise them on the potential conflict of interest. If the defendants choose not to seek the advice of independent counsel, they must expressly waive their right to do so, or their waiver of conflict-free representation will be ineffective. When a defendant knowingly, intelligently, and voluntarily waives the right to conflict-free representation, the district court must accept the waiver. Once the district court accepts the waiver, the defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and cannot subsequently claim that the conflict he waived resulted in ineffective assistance of counsel. In this case-involving spouses accused of brutally murdering their roommate, stuffing her body in the trunk of their Jaguar, and setting the car on fire to cover up the alleged crimes-the district court is directed to hold a new canvass of both defendants to ensure that the defendants understand that their waiver of conflict-free representation will preclude them from seeking a mistrial arising out of any conflicts from the dual representation and will preclude claims based on the conflict from being raised on appeal or during post- conviction proceedings (the waiver must be knowing, intelligent, and voluntary).

Martinez v. Maruszczak, 123 Nev. Adv. Op. No. 43 (October 11, 2007) – The Court reverses a declaratory judgment in a medical malpractice case, ruling that the appellant, a publicly employed physician, is not immune from liability under NRS 41.032(2) but that any damage award against him will be limited by NRS 41.035(1), given his status as a state employee. The Court's analysis focuses on Nevada's statutory waiver of sovereign immunity and a statutory exception to that waiver, which immunizes state actors from liability for actions grounded upon the state actor's exercise or performance of a discretionary function or duty. Because Nevada's statutory language mirrors the Federal Tort Claims Act, the

Court adopts the two-part federal test, as articulated in *Berkovitz v. United States* [486 U.S. 531, 536-37 (1988)] and *United States v. Gaubert* [499 U.S. 315, 322 (1991)] for determining when the discretionary-function exception to the general waiver of governmental immunity applies. Under this two-part test, state-employed physicians enjoy immunity from medical malpractice liability only when their allegedly negligent acts involve elements of judgment or choice, and the judgment or choice made is of the kind that the discretionary-function exception was designed to shield, that is, a judgment or choice involving social, economic, or political policy considerations. If those two requisites for discretionary-function immunity are not satisfied, state-employed medical professionals are liable for malpractice to the extent of the statutory cap that applies to damages awards in tort actions against state employees.

Butler v. Bayer, 123 Nev. Adv. Op. No. 44 (October 11, 2007) – The Court affirms in part and reverses in part a district court summary judgment on all claims in a personal injury and civil rights action, in an opinion that examines the duty of prison officials to protect incarcerated persons from attacks by other prisoners, the duty of care owed by prison officials when releasing physically and mentally disabled inmates, and the extent to which the Nevada Department of Corrections, as a state actor, is entitled to discretionary-act immunity in such matters under NRS 41.032(2). With respect to the duty of prison officials to protect inmates from attacks by other inmates, the Court adopts the approach taken by the Restatement (Second) of Torts, which defines the duty as one of reasonable care to prevent intentional harm or to avoid an unreasonable risk of harm, when such harm is foreseeable. Harm is foreseeable when prison officials actually know that an inmate is at risk, that the attacking inmate is dangerous, or when prison officials otherwise have reason to anticipate the attack. In this case, as the appellant never informed prison officials that he was afraid for his personal safety, and officials were not otherwise “on notice” of an imminent attack, prison officials had no specific duty to protect the appellant from the unforeseeable attack that occurred. Consequently, summary judgment was appropriate on the appellant’s claims related to the direct attack. Regarding the duty of care when prison officials release disabled inmates, the Court rules that 1) general negligence standards apply, so that prison officials have a duty to exercise reasonable care to avoid foreseeable harm in releasing a disabled inmate; and 2) the action of releasing inmates does not require consideration of social, economic, or political policy, indicating that prison officials are not entitled to discretionary-act immunity for their actions. Here, because genuine issues of material fact exist as to whether the respondents acted negligently in effectuating appellant’s release, the Court concludes that the district court erred in granting summary judgment with respect to Butler’s claim of negligence by abandonment.

D.R. Horton v. Dist. Ct., 123 Nev. Adv. Op. No. 45 (October 11, 2007) – The Court grants in part a writ petition challenging a district court order denying a motion for declaratory relief during the pre-litigation stage of a constructional defect action, ruling that district courts should determine the sufficiency of a pre-

litigation notice of constructional defects under NRS 40.645 by applying a “reasonable threshold test,” requiring that an extrapolated notice must have a reasonable statistical basis to describe the alleged defects and their locations in reasonable detail sufficient to afford contractors a meaningful opportunity to repair the alleged defects.

Boulder Oaks Cmty. Ass’n v. B & J Andrews, 123 Nev. Adv. Op. No. 46 (November 1, 2007) – The Court affirms a district court order granting a preliminary injunction in a real property action, ruling that developers have authority, consistent with NRS 116.003, to define “declarant” in CC&Rs differently than the definition set forth in NRS 116.035.

Dewey v. State, 123 Nev. Adv. Op. No. 47 (November 1, 2007) – The Court affirms a conviction by jury verdict of second-degree murder with the use of a deadly weapon, ruling that 1) unless a suspect’s assertion of the right to remain silent includes a clear, unequivocal, and unambiguous request for an attorney, it is not an invocation of the right to counsel under Miranda; thus, a suspect’s exercise of the right to remain silent under Miranda, without more, does not operate as a request for counsel; and 2) the police may resume questioning a suspect who has invoked her right to remain silent only if they have “scrupulously honored” the suspect’s prior exercise of her right to terminate questioning and issue a new set of Miranda warnings prior to reinitiating further interrogation.

Matter of Halverson, 123 Nev. Adv. Op. No. 48 (November 1, 2007) – The Court affirms an order of the Nevada Commission on Judicial Discipline, which imposed an interim suspension upon district court Judge Elizabeth Halverson, ruling that the Commission did not abuse its discretion in determining, based on the totality of the circumstances, that Judge Halverson’s conduct rose to such a level that she posed a substantial threat of serious harm to the public and to the administration of justice, thus warranting her interim suspension.

Staccato v. Valley Hospital, 123 Nev. Adv. Op. No. 49 (November 8, 2007) – The Court reverses in part and dismisses in part a district court judgment on a directed verdict and an order denying a new trial motion in a medical malpractice action, ruling that a medical expert witness need not have the same credentials or classification as the defendant medical care provider; instead, the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to perform or render the medical procedure or treatment being challenged as negligent, and whether that witness’s opinion will assist the jury (in this case, the district court entered a directed verdict for the defense after disqualifying appellant’s proposed expert witness, an emergency room physician, on the basis that the physician was not qualified to testify against a nurse who allegedly administered an intramuscular injection (a procedure for which the physician sufficiently demonstrated his expertise) in a manner contrary to the acceptable standard of care).

Nelson v. State, 123 Nev. Adv. Op. No. 50 (November 8, 2007) – The Court affirms a conviction by jury verdict of conspiracy to commit robbery, robbery with the use of a deadly weapon, and failure to stop on the signal of a police officer, ruling that NRS 484.348(3)(b), which prohibits drivers from operating a motor vehicle in such a manner as to endanger other persons or property while fleeing a police officer who has signaled for the driver to stop, is not unconstitutionally vague because individuals of ordinary intelligence can easily discern whether their operation of a vehicle while fleeing from a police vehicle places life or property in danger.

Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. Adv. Op. No. 51 (November 8, 2007) – The Court reverses a district court order denying injunctive relief to enforce an exclusive franchise agreement, ruling that 1) a county may constitutionally regulate construction waste under its police powers, since construction waste poses public health and safety concerns; 2) Douglas County appropriately exercised its police power in granting an exclusive franchise agreement to collect and dispose of construction waste to Douglas Disposal pursuant to NRS 444.510(1), NRS 244.187(3) and NRS 244.188(1)(b); and 3) Douglas County’s grant of an exclusive franchise to Disposal does not impermissibly violate the “dormant” aspect of the Commerce Clause of the United States Constitution.

Allstate Ins. Co. v. Thorpe, 123 Nev. Adv. Op. No. 52 (November 21, 2007) – The Court reverses in part and affirms in part a district court order granting declaratory relief and dismissing an insurance action, ruling that Nevada’s so-called “prompt-pay” statute, NRS 690B.012, does not expressly create a private right of action in favor of an insured’s medical provider to sue an insurer who fails to make prompt payments to the insured or the insured’s medical providers; instead, the statutory scheme contemplates an exclusive administrative procedure for resolving claims concerning alleged violations of NRS 690B.012, under which medical providers, as persons with a direct and immediate pecuniary interest in the prompt payment of medical payment benefits, may seek administrative remedies before the Nevada Department of Insurance (NDOI), subject to judicial review under the Nevada Administrative Procedure Act.

Horgan v. Felton, 123 Nev. Adv. Op. No. 53 (November 21, 2007) – The Court affirms in part and reverses in part a district court judgment resolving property rights and awarding attorney fees, ruling that attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to remove a cloud upon title (overruling in part Sandy Valley Associates v. Sky Ranch Estates, 117 Nev. 948, 955, 35 P.3d 964, 968-69 (2001)).

Wilson v. State, 123 Nev. Adv. Op. No. 54 (November 21, 2007) – The Court vacates an amended judgment of conviction, ruling that Nevada’s double jeopardy protections prohibit increasing a defendant’s sentence after the defendant’s conviction has been partially vacated on appeal; extending *Dolby v.*

State [106 Nev. 63, 65, 787 P.2d 388, 389 (1990)] to apply Nevada's double jeopardy protections with equal force regardless of the procedural posture in which the resentencing occurs - whether in the context of error correction in the district courts or in remanded proceedings.

Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. Adv. Op. No. 55 (December 13, 2007) – The Court affirms an order granting summary judgment in a § 1983 action and a post-judgment order awarding attorney fees and costs, presuming that oppositions missing from the record on appeal would support the district court's decisions and 1) reiterating the oft-stated rule that appellant bears the responsibility of ensuring an accurate and complete record on appeal and that missing portions of the record are presumed to support the district court's decision; 2) necessarily affirming the district court's order granting summary judgment after appellants failed to provide, in the record, their opposition to the summary judgment motion; and 3) ruling that the district court properly concluded that respondents as state entities are not "persons" under § 1983 and therefore had a valid legal basis for determining that appellants' claim lacked foundation and that § 1988 attorney fees were available.

SFPP, L.P. v. Dist. Ct., 123 Nev. Adv. Op. No. 56 (December 27, 2007) – The Court grants a writ petition challenging the district court's jurisdiction to conduct further proceedings in a district court case that was dismissed, ruling that once the district court dismissed this case with prejudice, it lost all jurisdiction concerning that judgment, except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure. The dismissed case involved a dispute concerning an underground petroleum pipeline relocation project; although the parties ultimately settled the dispute and had the corresponding case dismissed, differences concerning the share of the project's costs persisted, and the settlement agreement purported to reserve the district court's jurisdiction to address certain project cost issues.

Awada v. Shuffle Master, Inc., 123 Nev. Adv. Op. No. 57 (December 27, 2007) – The Court affirms in part, reverses in part, and dismisses in part a district court judgment in a contract action and a post-judgment order denying a new trial, ruling that 1) Nevada district courts have discretion to bifurcate equitable and legal issues raised in a single action, conduct a bench trial on the equitable issues, and dispose of the remaining legal and equitable issues in the action, so long as the disposal of those issues is available under Nevada law; 2) the district court in this case acted within its discretion when it bifurcated the parties' claims in order to try Shuffle Master's claim for rescission; 3) the district court did not abuse its discretion when it first considered respondents' counterclaim for rescission and rescinded the parties' agreement, since, based on its findings and conclusions, the district court properly disposed of all of appellants' contract-based claims against respondent Shuffle Master, Inc., because those claims could not stand absent a valid contract; 4) the district court improperly granted summary judgment as to the claims against respondent Mark Yoseloff and

appellants' remaining claims against Shuffle Master (for fraud, civil conspiracy, conversion, unjust enrichment, and tortious interference with contractual relations/prospective economic advantage) because those claims can survive absent a valid contract between the parties; and 5) the district court erred in resolving those claims without satisfying the procedural requirements of NRCPC 56.

Johanson v. Dist. Ct., 123 Nev. Adv. Op. No. 58 (December 27, 2007) – The Court grants a writ petition challenging a district court order sealing the entire case and restricting all communication regarding the underlying divorce proceedings, ruling that 1) the district court was obligated to maintain the divorce proceedings' public status under NRS 125.110 and manifestly abused any discretion it inherently possessed when it sealed the entire case file; and 2) the district court abused its discretion when it issued an overly broad gag order sua sponte, without giving notice or a meaningful opportunity to be heard, without making any factual findings with respect to the need for such an order in light of any clear and present danger or threat of serious and imminent harm to a protected interest, and without examining the existence of any alternative means by which to accomplish this purpose.

Hidalgo v. Dist. Ct., 123 Nev. Adv. Op. No. 59 (December 27, 2007) – The Court grants a writ petition challenging the district court's order denying petitioners' motion to strike the State's notices of intent to seek the death penalty, ruling that 1) solicitation to commit murder is NOT a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b); and 2) as no valid aggravators remain, the State's notices of intent to seek the death penalty do not satisfy the requirements of SCR 250(4)(c) and must be stricken.

Hsu v. County of Clark, 123 Nev. Adv. Op. No. 60 (December 27, 2007) – The Court vacates a district court order, entered on remand, dismissing an inverse condemnation action, ruling that 1) when the Court issues an intervening decision that constitutes a change in controlling law, courts subject to a previous decision may depart from the law of the case and apply the new rule of law; and 2) in this case the rule recently set forth in *McCarran International Airport v. Sisolak* [122 Nev. 645, 137 P.3d 1110 (2006)] clearly indicates that the height restrictions imposed by the County effectuated a per se regulatory taking of the landowners' airspace. The Court vacates the district court's dismissal order, instructs the district court to enter an order finding the County liable for a per se regulatory taking, and remands for a new trial on the issue of just compensation.

ASAP Storage, Inc. v. City of Sparks, 123 Nev. Adv. Op. No. 61 (December 27, 2007) – The Court affirms in part and reverses in part a district court order granting summary judgment in a governmental takings case brought under the Nevada Constitution, in a case arising from the City of Spark’s evacuation of appellants’ businesses during the New Year’s Day 1997 flood.

On the issue of whether a taking occurred, the Court rules that 1) appellants’ real and personal property constitute private property under the Nevada Constitution; and 2) the City’s erection of a barricade was only a temporary interference with appellants’ property rights and did not rise to the level of a taking.

On the issue of immunity, the Court rules that 1) NRS Chapter 414 facially immunizes the City from liability for acts that constitute either preparing for an emergency or carrying out emergency functions, overruling, in part, prior holdings in *Nylund v. Carson City* [117 Nev. 913, 34 P.3d 578 (2001)] and *Vernef v. City of Boulder City* [119 Nev. 549, 80 P.3d 445 (2003)]; 2) pre-emergency immunity depends on whether the government acts were undertaken in preparation for an emergency; 3) since neither the parties nor the district court had the opportunity to consider the City’s pre-emergency activities under the proper statutory framework, the portion of the district court’s order relating to pre-emergency activities is reversed and remanded; 4) on remand, the district court must also consider whether the City is immune from suit under NRS 41.032(2) for any alleged pre-emergency gross negligence or willful misconduct by its employees, for which the City could be vicariously liable under NRS 414.110(1); and 5) with respect to the district court’s order granting summary judgment on the claims related to the City’s handling of the flood emergency, on remand, the district court must also consider whether the City is immune from suit under NRS 41.032(2) for any alleged gross negligence, willful misconduct, or bad faith by its employees in responding to the emergency.

On the issue of appellants’ breach-of-contract claim, the Court rules that the district court’s order granting summary judgment did not comply with NRCP 56(c) and reverses and remands for compliance with the rule.