

## **2008 Nevada Supreme Court Opinion Digest**

*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008) – On a petition for rehearing in consolidated appeals from district court orders in cases involving similar allegations of attorney misconduct, the Court grants the petition in part, vacates the prior opinion in this matter (122 Nev. Adv. Op. No. 115 (December 28, 2006)), and issues a new opinion substantially revising 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)). New trial requests based on attorney misconduct must be evaluated differently depending upon whether counsel objected to the misconduct during trial. When a party successfully objects to the misconduct, the district court may grant a subsequent motion for a new trial if the moving party demonstrates that the misconduct's harmful effect could not be removed through any sustained objection and admonishment. With respect to unobjected-to misconduct, the district court may grant a motion for a new trial only if the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different. When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings, applying these standards.

*Dancer v. Golden Coin, Ltd.*, 124 Nev. Adv. Op. No. 2 (January 31, 2008) – The Court reverses a district court order dismissing claims and counterclaims in a labor law dispute, ruling that 1) under a federal preemption analysis, class action claims of unpaid minimum wage balances brought under the Nevada Wage and Hour Law (NWHL) are not preempted under the Federal Fair Labor Standards Act (FLSA) since the FLSA expressly provides that higher state minimum wage legislation may control minimum wage claims, and Nevada's minimum wage law provides greater employee wage protection than that provided under the FLSA; and 2) in accordance with Nevada's class action rule, the proposed representative's claims were sufficiently factually and legally similar to those of the purported class to allow substitution, and thus, the district court must proceed with the NWHL claims with the proposed class representative, if still available, under NRCP 23.

*Cote H. v. Dist. Ct.*, 124 Nev. Adv. Op. No. 3 (January 31, 2008) – The Court denies a writ petition challenging a district court order denying a motion to dismiss a delinquency petition, ruling that NRS 201.230(1), which defines the offense of lewdness with a minor under the age of 14, can be used to adjudicate as delinquent minors under the age of 14, even though they are part of the class of persons protected by the statute.

*Pankopf v. Peterson*, 124 Nev. Adv. Op. No. 4 (February 7, 2008) – The Court reverses a district court order dismissing, without prejudice, appellant's amended complaint for failure to state a claim under NRCP 12(b)(5) in a contract action, ruling that an action against a residential designer based on alleged mistakes in his plans drawn to construct a personal residence is not subject to the procedural

requirements set forth in the provisions of NRS Chapter 40 that pertain to construction defect actions.

*Nevada Classified Sch. Emp. Ass'n v. Quaglia*, 124 Nev. Adv. Op. No. 6 (February 28, 2008) – The Court affirms a district court order resolving complaints for injunctive, declaratory, and compensatory relief in an employment matter and a post-judgment order denying a new trial, ruling that 1) a corporation's bylaw is void to the extent that it is inconsistent with the corporation's articles of incorporation; and 2) an amendment to the bylaws is likewise invalid when it is adopted under the invalid bylaw's voting procedure.

*Loomis v. Whitehead*, 124 Nev. Adv. Op. No. 7 (February 28, 2008) – The Court reverses a district court order granting partial summary judgment, certified as final under NRCP 54(b), in a contract action, ruling that NRS 602.070, which prohibits persons who fail to file an assumed or fictitious name certificate from suing on any contract or agreement made under the assumed or fictitious name, does not bar the partners of an unregistered fictitious name partnership from bringing an action arising out of a business agreement that was not made under the fictitious name, provided the partners did not conduct the business or enter into an agreement under the fictitious name or otherwise mislead the other party into thinking that he was doing business with some entity other than the partners themselves (limiting *Brad Assocs. v. Nevada Fed. Financial*, 109 Nev. 145, 848 P.2d 1064 (1993)).

*In re Tiffany Living Trust 2001*, 124 Nev. Adv. Op. No. 8 (March 6, 2008) – On consolidated appeals from district court orders entered in a trust proceeding, the Court affirms, ruling that 1) an attorney, whose law firm partner prepares an estate plan for a client who names the attorney as the primary beneficiary of the estate, must overcome the presumption of undue influence by clear and convincing evidence (and that undue influence was rebutted by clear and convincing evidence in the record); 2) violations of the Nevada Rules of Professional Conduct do not give rise to a private right of action (citing *Mainor v. Nault* 120 Nev. 750, 768-69, 101 P.3d 308, 320-21 (2004)); and 3) the district court did not err in dismissing the civil action for constructive trust that was instituted after the trust proceedings had already taken place.

*UMC Physicians v. Nev. Serv. Emp. Union*, 124 Nev. Adv. Op. No. 9 (March 6, 2008) – The Court reverses a district court order denying a petition for judicial review in a labor matter, ruling that Nevada's Local Government Employee-Management Relations Board must hear a complaint from any "employee organization" (as defined in NRS 288.040) that presents a justiciable controversy.

*Torrealba v. Kesmetis*, 124 Nev. Adv. Op. No. 10 (March 6, 2008) – The Court reverses a district court summary judgment in a tort action, ruling that 1) claims brought under NRS 240.150(1) and NRS 240.150(2) (civil liability and penalties for notary misconduct or neglect) are claims upon a liability created by statute, other than a penalty or forfeiture, and are subject to a three-year statute of limitations under NRS 11.190(3)(a); and 2) in determining whether a recorded but improperly notarized instrument can impart constructive notice of a fraud claim

subject to a three-year statute of limitations under NRS 11.190(3)(d), an improperly notarized instrument is void, and thus does not provide constructive notice for statute of limitations purposes, if either the notary or any party to the instrument benefitted from the improper notarization or any harm flowed from the transaction.

Grey v. State, 124 Nev. Adv. Op. No. 11 (March 13, 2008) – The Court affirms in part and vacates in part a conviction of one count of false imprisonment by using a person as a human shield, in part 1) promulgating a new rule of criminal procedure requiring parties in criminal cases to give notice of expert rebuttal witnesses; 2) holding that the State’s failure to provide such notice in this case does not require reversal; and 3) ruling that the district court improperly sentenced appellant as a habitual criminal under NRS 207.010, where the State failed to file a notice of habitual criminality and failed to charge appellant as a habitual criminal in the indictment.

Dozier v. State, 124 Nev. Adv. Op. No. 12 (March 13, 2008) – The Court affirms an order of the district court denying a post-conviction petition for a writ of habeas corpus on a pro per claim of ineffective assistance of counsel, ruling that when a defendant charged with a criminal offense affirmatively raises a statute-of-limitations defense, if the State seeks to disprove that defense by showing that the offense was committed in a secret manner under NRS 171.095(1)(a), the State must do so by a preponderance of the evidence.

State v. Lewis, 124 Nev. Adv. Op. No. 13 (March 13, 2008) – The Court dismisses the State’s appeal from a district court order granting a presentence motion to withdraw a guilty plea, ruling that the Court lacks jurisdiction to entertain the State’s appeal because there is no statute or rule providing for an appeal from an intermediate order of the district court allowing a defendant to withdraw a guilty plea before sentencing.

Public Employees’ Benefits Prog. v. LVMPD, 124 Nev. Adv. Op. No. 14 (March 20, 2008) – The Court reverses a district court order granting declaratory relief in an action concerning a statutory local government retiree health benefit subsidy, ruling that local government employers must pay the subsidy for their retirees who joined PEBP, even though, before retirement, those local government employees’ health insurance benefits were provided through a collectively bargained-for health trust, on the basis that 1) under NRS 287.023(1), local government employees may elect to join PEBP upon retirement if the health benefits they obtained during employment fall within a statutorily described health care program; 2) under NRS 287.023(4), if an employee who was covered by one of those statutory health care programs joins PEBP upon retirement, the former local government employer must subsidize the retiree’s PEBP premiums; and 3) a collectively bargained-for health trust is one of the types of statutorily described health care programs that qualifies local government employees to enroll with PEBP. Furthermore, the Court rules that the statutory subsidy for PEBP premiums applies to retirees who joined PEBP before the subsidy statute’s effective date of October 1, 2003, on the basis that 1) applying the statute to those retirees is not a “retroactive” application; 2) the legislative history indicates

that the subsidy applies, as of October 1, 2003, to current retirees; and 3) the Legislature has clarified any doubt as to its intent that the subsidy apply to current retirees through a 2007 legislative amendment to NRS 287.023.

Sparks Nugget v. State, Dep't of Taxation, 124 Nev. Adv. Op. No. 15 (March 27, 2008) – The Court reverses a district court summary judgment in a sales and use tax refund case, ruling that complimentary patron and employee meals provided by businesses are exempted from sales and use taxes under Article 10, Section 3(A) of the Nevada Constitution (establishing a sales and use tax exemption for most “food for human consumption”) because the uncooked food used to prepare those meals qualified as “food for human consumption” at the time of its initial purchase, and no taxable event occurred thereafter.

In re Orpheus Trust, 124 Nev. Adv. Op. No. 16 (March 27, 2008) – The Court reverses a district court order instructing a special trustee regarding proposed distribution adjustments in a trust administration matter, ruling that the power to adjust between trust principal and income set forth in NRS 164.795 is a corrective power and may be exercised with respect to principal and income accrued in the year immediately preceding a special trustee’s appointment, provided 1) the trustees abide by the standards of the Uniform Prudent Investor Act; 2) the terms of the trust require distribution of income to an income beneficiary; and 3) the special trustee determines that an adjustment is necessary. In analyzing the propriety of any proposed adjustment, the challenging beneficiary bears the burden under NRS 164.725(7) of demonstrating that the trustee did not appropriately comply with the requirements set forth in NRS 164.795(1) and (2).

Andersen Family Assocs. v. State Engineer, 124 Nev. Adv. Op. No. 17 (March 27, 2008) – The Court affirms a district court order denying judicial review in a water law matter, ruling that the cancellation and later reinstatement of a permit modifying an entity’s prestatutory vested water rights cannot result in the entity losing its priority to use that water flow under NRS 533.395(3) because Nevada law prevents such rights from impairment by statute; however, prestatutory vested water rights are subject to state regulation, and the holders of such rights must comply with state permit requirements when seeking to modify the use of their vested rights.

International Game Tech. v. Dist. Ct., 124 Nev. Adv. Op. No. 18 (March 27, 2008) – The Court denies a writ petition challenging a district court order that denied a motion to dismiss a complaint for failure to state a claim under the Nevada False Claims Act’s anti-retaliation provisions, ruling that, although NRS 357.250(2)(b) prevents an employee who participated in fraudulent activity from recovering under the FCA’s anti-retaliation provisions unless that employee shows that his employer pressured him into the fraudulent activity in the first place, it does not limit recovery to only those employees whose employers pressured them into such activity. Instead, it simply does not apply to employees who did not engage in fraudulent activity. As a result, an employee who did not participate in any fraudulent activity may recover simply by alleging and proving

that his employer retaliated against him, in violation of NRS 357.240(2), for lawfully disclosing FCA information.

*Brooks v. State*, 124 Nev. Adv. Op. No. 19 (April 3, 2008) – The Court reverses a jury conviction of conspiracy to commit robbery and robbery with the use of a deadly weapon, ruling in pertinent part that an unarmed offender “uses” a deadly weapon and therefore is subject to a sentence enhancement under NRS 193.165 when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

*Turner v. Mandalay Sports Entm’t*, 124 Nev. Adv. Op. No. 20 (April 17, 2008) – The Court affirms a district court summary judgment in a personal injury action, ruling that baseball stadium owners and operators have a limited duty to protect spectators against injuries caused by foul balls that are errantly projected into the stands and that respondent satisfied its duty as a matter of law. The Court expressly adopts the “limited duty rule,” which places two important requirements on stadium owners and operators: 1) to provide a sufficient amount of protected seating for those spectators “who may be reasonably anticipated to desire protected seats on an ordinary occasion” and 2) to provide protection for all spectators located in the most dangerous parts of the stadium, that is, those areas that pose an unduly high risk of injury from foul balls (such as directly behind home plate).

*Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. Adv. Op. No. 21 (April 17, 2008) The Court affirms in part and reverses in part a district court order dismissing an inverse condemnation action, ruling in pertinent part that a municipality’s announcement of intent to condemn a parcel of land may give rise to a cause of action by the landowner for damages based on allegations that, under the circumstances, the municipality acted improperly in making the announcement before instituting an eminent domain action (citing *State, Department of Transportation v. Barsy*, 113 Nev. 712, 941 P.2d 971 (1997)).

*Attorney General v. Nevada Tax Comm’n*, 124 Nev. Adv. Op. No. 22 (April 24, 2008) – The Court reverses a district court order dismissing a complaint to void a Nevada Tax Commission decision for open meeting law violations, ruling that the Tax Commission’s practice of closing the entirety of a session at a taxpayer’s request violates the Open Meeting Law (NRS chapter 241) since, under the law applicable to this case, the Tax Commission could only close sessions in a taxpayer’s appeal to receive confidential evidence, and question the parties, and hear argument concerning that evidence, but it was required to take nonconfidential evidence, deliberate the collective discussion of relevant facts, and vote in open session subject to the Open Meeting Law.

*Loomis v. Whitehead*, 124 Nev. Adv. Op. No. 7 (May 1, 2008) - The Court reverses a district court order granting partial summary judgment, certified as final under NRCP 54(b), in a contract action, ruling that NRS 602.070 does not bars the partners of an unregistered fictitious name partnership from bringing an

action arising out of a business agreement that was not made under the fictitious name. [Note: Corrected opinion issued in place of opinion filed February 28, 2008.]

Johanson v. Dist. Ct., 124 Nev. Adv. Op. No. 23 (May 1, 2008) – 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 the district court manifestly abused its discretion when it ordered the entire case file sealed, without making any findings under NRS 125.110, and when it, sua sponte, issued a gag order prohibiting all communication relating to the case, without providing reasonable notice that it was considering such a restrictive order. Gag orders may be issued only when: (1) the activity poses a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) no less restrictive means are available. [Note: Opinion issued December 27, 2007, withdrawn; this opinion issued in place of prior opinion.]

Father & Sons v. Transp. Servs. Auth., 124 Nev. Adv. Op. No. 24 (May 1, 2008) – On consolidated appeals from district court orders denying petitions for judicial review in common carrier certification matters, the Court affirms, ruling that, under NRS chapter 706, a company that is financially interested in providing extended referral services to the public to facilitate intrastate moves through individuals who are paid to load, drive, and unpack vehicles containing household goods may qualify as a fully regulated common motor carrier even though the company itself does not physically move the goods.

McLellan v. State, 124 Nev. Adv. Op. No. 25 (May 1, 2008) – The Court affirms a jury conviction of 22 counts of sexual assault with a minor under 14 years of age and 20 counts of lewdness with a child under 14 years of age, ruling that 1) the district court's admission into evidence of a wiretapped phone call placed by California police to the appellant in Nevada was admissible under NRS 48.077 since Nevada law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence; 2) the district court did not abuse its discretion in admitting testimony regarding prior bad acts in California because the evidence was proof of appellant's motive and plan to sexually abuse the victim; and 3) the district court's failure to give a limiting instruction prior to the admission of the prior bad act evidence regarding the California incident resulted in harmless error because the evidence did not have a substantial or injurious effect on the jury's verdict (clarifying *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), to establish that the defendant may waive the giving of a limiting instruction when the bad act evidence is admitted at trial).

Las Vegas Fetish & Fantasy v. Ahern Rentals, 124 Nev. Adv. Op. No. 26 (May 8, 2008) – The Court affirms a district court judgment, including an award of costs and attorney fees, in a contract action, clarifying that the unclean hands doctrine should only bar a party from obtaining an equitable remedy when the egregiousness of the party's misconduct constituting the party's unclean hands and the seriousness of the harm caused by the misconduct collectively weigh against allowing the party to obtain such a remedy, and rejecting appellant's

contention that its abuse of process judgment against respondent automatically barred respondent from obtaining a judgment against appellant based on unjust enrichment.

*Bob Allyn Masonry v. Murphy*, 124 Nev. Adv. Op. No. 27 (May 8, 2008) – The Court reverses a district court order granting judicial review in a workers’ compensation case, adopting the “street-risk rule” in ruling that, depending upon the facts, an employee’s injuries sustained in a vehicular accident during the return journey of a special errand undertaken at the employer’s request may arise out of and in the course of employment, entitling the employee to workers’ compensation benefits.

*Hamm v. Arrowcreek Homeowners’ Ass’n*, 124 Nev. Adv. Op. No. 28 (May 15, 2008) – The Court affirms a district court order dismissing a homeowners’ action that sought to release a homeowners’ association lien, ruling that 1) homeowners must submit to mediation or arbitration, pursuant to NRS 38.310, before they initiate a civil action in the district court to release a homeowners’ association assessment lien on their property since the filing of a lien, in and of itself, does not create “an immediate threat of irreparable harm” and that an action to release a lien, without more, does not “relat[e] to the title to residential property.” [NRS 38.300], and 2) NRS 38.310 applies to actions against a collection agency that acts as a homeowners’ association’s agent.

*Whitemaine v. Aniskovich*, 124 Nev. Adv. Op. No. 29 (May 15, 2008) – The Court affirms a district court order confirming an arbitration award, ruling that two separately executed employment agreements formed one contract even though one of the agreements contained an integration clause (extending *Collins v. Union Federal Savings & Loan*, 99 Nev. 284, 662 P.2d 610 (1983)).

*Stockmeier v. State, Dep’t of Corrections*, 124 Nev. Adv. Op. No. 30 (May 15, 2008) – The Court affirms a district court order dismissing a complaint concerning Nevada’s Open Meeting Law, ruling that the violation of Nevada’s Open Meeting Law cannot support a private cause of action for damages since the statute governing Open Meeting Law claims, NRS 241.037, allows for violations to be remedied exclusively through declaratory and injunctive relief.

*Federal Ins. v. Am. Hardware Mut. Ins.*, 124 Nev. Adv. Op. No. 31 (May 29, 2008) – In response to a question from the United States District Court for the District of Nevada certified under NRAP 5, the Court rules that under Nevada law, absent an expressed intent to the contrary, an additional insured endorsement that covers liabilities arising out of a named insured’s operations performed for the additional insured provides liability coverage, regardless of fault, so long as the injury or loss suffered is connected to the named insured’s operations performed for the additional insured’s benefit.

*Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. Adv. Op. No. 32 (May 29, 2008) – The Court affirms in part and reverses in part a district court order denying judicial review of a Nevada State Board of Pharmacy decision, ruling that (1) because appellants held licenses issued by the Board, the Board had jurisdiction under NRS 639.210 to discipline and impose penalties on them even

if the acts supporting unprofessional conduct occurred outside the state; 2) as an administrative body, the Board was within its discretion to join appellants in a single action, and neither party was unduly prejudiced by the joinder; 3) appellants received adequate notice of the charges against them; 4) there is no general due process right to discovery in an administrative proceeding, and because no authority for such a right exists in the Board's regulations, appellants were not entitled to conduct discovery; 5) the Board adjudicated appellants guilty only of charges listed in the charging document; 6) the Board applied the proper legal standards in reaching all but one of its conclusions of law; 7) the Board's orders are not arbitrary and capricious; and (8) the Board did not pierce either appellant's corporate veils to impose liability on their principals under an alter ego theory.

Hidalgo v. Dist. Ct., 124 Nev. Adv. Op. No. 33 (May 29, 2008) – On petition for rehearing of Hidalgo v. District Court, 123 Nev. \_\_\_, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008), an original writ petition challenging the district court's order denying petitioner's motion to strike the State's notice of intent to seek the death penalty, the Court rules 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); 2) the State's notice of intent to seek the death penalty against petitioner does NOT satisfy the requirements of SCR 250(4)(c); 3) the State should be allowed to amend the notice of intent to cure the deficiency. Therefore, the Court grants the writ petition in part and instructs the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2), and to allow the State to amend its notice of intent to seek the death penalty with respect to the factual allegations supporting the pecuniary gain aggravator.

Mayfield v. Koroghli, 124 Nev. Adv. Op. No. 34 (May 29, 2008) – On consolidated appeals from district court judgments granting specific performance and awarding costs in a real property contract action, the Court affirms in part and reverses in part, ruling that 1) when a contract does not make the time for a party's performance of the essence, either party can make it so by setting a reasonable time for performance and notifying the other party of an intention to abandon the contract if it is not performed within that time; 2) absent such a demand for performance, or a term making time of the essence, a contract must be performed within a reasonable time; 3) what constitutes a reasonable time for a contract's performance is a question of fact to be determined based on the nature of the contract and the circumstances surrounding its making; 4) when a contract contains a condition precedent to a party's performance, that party may waive the condition and tender performance so long as the parties included the condition in the contract for the sole benefit of the party seeking to waive the condition and complete performing his contractual obligations; 5) whether a condition included in a contract is for the benefit of one or both parties is a question of fact; 6) when one party sues multiple defendants on similar claims based on the same set of facts, it is within the district court's discretion to determine whether the claims are so intertwined as to render apportionment



impracticable, but before declaring apportionment impracticable, the district court must make a good faith effort to apportion costs.

Law Offices of Barry Levinson v. Milko, 124 Nev. Adv. Op. No. 35 (May 29, 2008) – On consolidated appeals from district court orders denying petitions for judicial review in workers’ compensation matters, the Court affirms in part and reverses in part, ruling that 1) the neutrality rule [NRS 616A.010] does not alter the Court’s construction of “accident” and “injury” as set forth in American International Vacations v. MacBride [99 Nev. 324, 661 P.2d 1301 (1983)]; 2) to rebut the presumption under NRS 616C.150(2) that arises when a claimant files a notice of injury after termination, the claimant must prove that the injury did not arise from an event that occurred after termination; and 3) whether a claimant is entitled to an award of permanent partial disability inevitably turns on whether she is entitled to workers’ compensation in the first instance [NRS 616C.490(1)].

Brooks v. Bonnet, 124 Nev. Adv. Op. No. 36 (June 5, 2008) – The Court affirms a district court order entered after a bench trial in an easement action, ruling that appellant did not possess an express easement, easement by necessity, or residual easement over a strip of land owned by respondents.

Douglas v. State, 124 Nev. Adv. Op. No. 37 (June 5, 2008) – On a pro per appeal, the Court reverses an order of the district court denying appellant’s petition for a writ of mandamus, ruling that 1) NRS 213.1214 does not authorize the State Board of Parole Commissioners (Parole Board) to require Psychological Panel (Psych Panel) certification prior to a prisoner’s release on parole from a sentence involving a nonsexual offense not enumerated in NRS 213.1214(5), regardless of whether the prisoner has ever been convicted of a sexual offense; and 2) Psych Panel certification is required on an offender’s last sex offense sentence, regardless of whether this will involve a release to the street or an institutional parole to serve a sentence for a nonsexual offense [clarifying Stockmeier v. Psychological Review Panel, 122 Nev. 534, 135 P.3d 807 (2006)].

In re Assad, 124 Nev. Adv. Op. No. 38 (June 12, 2008) – The Court affirms in part and reverses in part a decision by the Nevada Commission on Judicial Discipline to publicly censure Las Vegas Municipal Judge George Assad, ruling that 1) the Commission did not abuse its discretion in refusing to admit expert testimony, and Judge Assad was not deprived of due process by this refusal or by any other action of the Commission; 2) the Commission’s findings concerning violations of Nevada Code of Judicial Conduct Canon 2A are supported by clear and convincing evidence and thus affirmed; 3) the Commission’s imposition of a censure is reversed because a public censure is too extreme a form of discipline in this case, since the record does not support a finding that Judge Assad’s conduct was willful and reflects considerable mitigation; and 4) Judge Assad shall issue a formal apology and enroll, at his own expense, in the next available judicial ethics class at the National Judicial College.

Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. Adv. Op. No. 39 (June 12, 2008) – On consolidated appeals from a district court judgment entered on a

jury verdict in a contract and lien dispute action and from post-judgment orders denying a new trial and awarding attorney fees and costs, the Court affirms in part, vacates in part, and reverses in part, ruling that 1) where the district court creates special interrogatories that result in irreconcilably inconsistent verdicts, pursuant to NRCP 49(b), the district court shall not enter judgment on the irreconcilably inconsistent verdicts; 2) in this case, the district court abused its discretion when it entered judgment on the inconsistent answers to the special interrogatories and the general verdict, and the judgment on the breach of contract claim as it concerns the retrofit issue is therefore reversed and remanded for a new trial; 3) the remaining portion of the district court's judgment regarding the lien waiver provision, the pay-if-paid provision, and the principal owed, plus interest, are affirmed; 4) since a new trial is warranted on the breach of contract claim concerning the retrofit work, the portion of the district court's order awarding attorney fees is vacated and the portion of its order awarding sanctions is reversed.

Haney v. State, 124 Nev. Adv. Op. No. 40 (June 12, 2008) – The Court dismisses a district court order denying appellant's motion to correct an illegal sentence, ruling that flat time sentencing contradicts legislative intent to allow inmates to earn credits for early release pursuant to NRS Chapter 211.

Diomampo v. State, 124 Nev. Adv. Op. No. 41 (June 12, 2008) – The Court reverses a jury conviction of one count of mid-level trafficking in a controlled substance, ruling in pertinent part that 1) the State's peremptory challenge of a prospective juror on the ground that he did not understand the English language violates the rule set forth in the United States Supreme Court decision in *Batson v. Kentucky* [476 U.S. 79 (1986)]; 2) because appellant was not the owner of the vehicle and the trafficking level of contraband was found under the passenger seat of that vehicle, and because the State's theory of criminal liability was not based upon direct physical possession at the point of police contact, comments on appellant's post-Miranda silence were not harmless beyond a reasonable doubt; and 3) the State improperly introduced character evidence prejudicially suggesting that methamphetamine users generally resort to burglary to support their addictive behavior, in violation of NRS 48.045(2).

Somee v. State, 124 Nev. Adv. Op. No. 42 (July 3, 2008) – The Court reverses a jury conviction of four counts of attempted murder with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang and two counts of carrying a concealed weapon and remands for a new trial, ruling that 1) in determining whether an officer has reasonable articulable suspicion under the totality of the circumstances to justify a pat-down search, one factor a court may consider is whether the officer had reasonable articulable suspicion that the suspect was involved in narcotics activity; 2) filed interviews may in certain circumstances violate a defendant's constitutional rights, necessitating the exclusion of the evidence obtained from the interview; and 3) the record in this case is insufficient for this court to determine the constitutionality of the police officers' pat-down search and the field interviews of the appellant conducted prior to the crime.

*Estate of Maxey v. Darden*, 124 Nev. Adv. Op. No. 43 (July 3, 2008) – The Court reverses a district court partial summary judgment, certified as final under NRCP 54(b), in a medical malpractice action, and considers, for the first time, multiple sections of Nevada’s Uniform Act on Rights of the Terminally Ill (the Act), codified in NRS 449.535 through 449.690, ruling that genuine issues of material fact remain concerning whether a terminally ill patient’s attending physician improperly withheld or withdrew life-sustaining treatment from the patient.

*Dickinson v. American Medical Response*, 124 Nev. Adv. Op. No. 44 (July 3, 2008) – The Court reverses a district court order denying a petition for judicial review in a workers’ compensation matter, ruling that 1) equitable estoppel and waiver principles may be applied in workers’ compensation proceedings, and therefore, since those principles generally require a factual determination, the appeals officer has authority to and must consider them in the first instance; and 2) in resolving aspects of a contested case, including equitable estoppel or waiver, the appeals officer must support the determination with factual findings.

*Bianchi v. Bank of America*, 124 Nev. Adv. Op. No. 45 (July 3, 2008) – The Court affirms a district court order denying an NRCP 60(b) motion to vacate the domestication of a foreign judgment, ruling that a judgment creditor may enforce a renewed domesticated foreign judgment in Nevada, even if Nevada’s limitation period for the enforcement of judgments has run on the original domesticated foreign judgment, when the underlying foreign judgment is valid and enforceable in the issuing state.

*Nunnery v. State*, 124 Nev. Adv. Op. No. 46 (July 3, 2008) – The Court grants in part a writ petition challenging the district court’s order denying petitioner’s motion to strike three aggravating circumstances in the State’s notice of intent to seek the death penalty, ruling that 1) the elements of conspiracy to commit robbery do not include the use or threat of violence to the person of another; 2) although conspiracy to commit robbery involves conspiring to commit a violent act, it is not itself a felony involving the use or threat of violence as contemplated by NRS 200.033(2)(b); and 3) the aggravating circumstance alleging conspiracy to commit robbery as a prior violent felony must be stricken.

*Halverson v. Secretary of State*, 24 Nev. Adv. Op. No. 47 (July 3, 2008) – The Court denies a writ petition and request for declaratory relief, challenging the constitutionality of Senate Bill 195 (amending NRS 3.018), ruling that S.B. 195’s creation of judicial offices with initial two-year terms is constitutional, since the Nevada Constitution allows the Legislature to create new judicial positions with initial terms of fewer than six years in order to place those positions on the same election cycle as district court judge positions generally.

*Hallmark v. Eldridge*, 124 Nev. Adv. Op. No. 48 (July 24, 2008) – The Court affirms in part and reverses in part a district court judgment on a jury verdict in a personal injury action and an order denying a motion for a new trial, ruling that 1) the district court below abused its discretion when it allowed a physician with an engineering background to testify as a biomechanical expert against a personal injury plaintiff because, among other reasons, the testimony did not assist the

jury in understanding the evidence as the testimony was not based on a reliable methodology; 2) prejudice stemming from errors in the admission of evidence bearing upon a damage claim requires reversal when the error substantially affects the rights of the complaining party on appeal; 3) such an error substantially affects those rights when the appellant establishes, based upon a sufficient appellate record, the reasonable probability of a different result in the absence of the error; and 4) the record on appeal sufficiently demonstrates that, but for the error, appellant (plaintiff in the action below) would probably have obtained a more favorable damage award.

*Moldon v. County of Clark*, 124 Nev. Adv. Op. No. 49 (July 24, 2008) – The Court reverses a district court order, certified as final under NRCP 54(b), denying a motion for interest in an eminent domain action, ruling that 1) because condemnation deposits constitute private property to the extent that a party is entitled to the condemnation deposit, the party is likewise entitled to the interest earned on that deposit; 2) if interest earned from the condemnation deposit is placed into a local government’s general fund for public benefit, that act constitutes a taking under the Fifth and Fourteenth Amendments; and 3) former NRS 355.210, allowing local governments to keep interest earned on funds deposited with the court, was unconstitutional, as applied to condemnation deposits that are ultimately awarded to a private party.

*Browning v. State*, 124 Nev. Adv. Op. No. 50 (July 24, 2008) – The Court affirms a sentence of death after remand for a new penalty hearing, ruling that 1) the district court did not err, or did not commit reversible error, in precluding appellant from presenting evidence developed during post-conviction proceedings indicating that a host of evidence adduced at the original trial was false or misleading; 2) reconsideration of harmlessness respecting the admission of improper evidence during the guilt phase is not merited; 3) nothing in SCR 250 precludes the appointment of senior judges to preside over capital trials and the senior judge presiding over the penalty hearing was properly appointed; 4) the district court did not abuse its broad discretion to remove a juror for cause based upon the juror’s insistence that he could not render a death verdict in the case; 5) the district court’s findings are supported by substantial evidence that the jurors were instructed on and considered the mitigating circumstances in imposing the death penalty; 6) appellant failed to object to an erroneous instruction regarding felony-murder aggravators and no prejudice affecting appellant’s substantial rights resulted; 7) instances of prosecutor error did not constitute misconduct; 8) the district court did not err in denying appellant’s request for investigative funds since appellant fails to demonstrate prejudice from an absence of death penalty data; 9) the use of leg restraints not visible to the jury during penalty hearing was not unconstitutional; 10) the admission of testimonial hearsay statement under *Crawford v. Washington* does not apply to capital penalty hearings; 11) all aggravation evidence regarding appellant’s prior felony convictions or other bad acts was presented at the original penalty hearing and the State complied with SCR 250(4)(f) by filing a notice of evidence in aggravation; and 12) the death sentence passes mandatory appellate review under NRS 177.055(2).

City of Las Vegas v. Dist. Ct. (Meunier), 124 Nev. Adv. Op. No. 51 (July 24, 2008) – The Court grants a writ petition challenging a district court order reversing a municipal court conviction of domestic battery and remanding the matter for conviction and sentencing for simple battery, ruling that a battery committed by a sister-in-law upon the person of her brother-in-law is an act of domestic violence under NRS 33.018.

Hill v. State, 124 Nev. Adv. Op. No. 52 (July 24, 2008) – The Court affirms a jury conviction of murder with use of a deadly weapon, with an elderly person enhancement, ruling that it is the domain of the district court judge, not the prosecuting attorney, to determine whether grand juror bias exists as such claims arise; however, when a defendant has been found guilty by a petit jury following a fair trial of the crime for which he was indicted by a grand jury, any error that may have occurred as a result of grand juror bias is harmless.

Vredenburg v. Sedgwick CMS, 124 Nev. Adv. Op. No. 53 (July 24, 2008) – The Court reverses a district court order denying a petition for judicial review in a workers' compensation matter, ruling that under NRS 616C.230(1), Nevada's willful self-injury exclusion, suicides are not willful if a sufficient chain of causation has been established by demonstrating that 1) the employee suffered an industrial injury; 2) the industrial injury caused some psychological condition severe enough to override the employee's rational judgment; and 3) the psychological condition caused the employee to commit suicide.

State v. Dist. Ct. (Pullin), 124 Nev. Adv. Op. No. 54 (July 24, 2008) – The Court grants a writ petition challenging a district court's decision to sentence real party in interest pursuant to ameliorative amendments made to the deadly weapon enhancement statute [NRS 193.165], ruling that the ameliorative amendments to NRS 193.165 do not apply to offenders who committed their crimes prior to the effective date of the amendments but were sentenced after that date.

Attorney General v. Montero, 124 Nev. Adv. Op. No. 55 (July 24, 2008) – The Court affirms a district court order denying a challenge to respondent's candidacy for district court judge and directing the Secretary of State to place respondent on the general election ballot as a candidate for district court judge in the Sixth Judicial District, ruling that, because district judges are recognized as "state officers" under NRS 293.109, a candidate who satisfies NRS 3.060's mandate that a district court judicial candidate must be a Nevada state resident for at least two years preceding the election is eligible for election within any judicial district within the state under NRS 293.1755(1)'s "state" residency requirement.

Secretary of State v. Burk, 124 Nev. Adv. Op. No. 56 (July 25, 2008) – The Court grants in part consolidated original petitions for extraordinary writ relief that seek to exclude real parties in interest's names from the 2008 primary and general election ballots based on the Nevada Constitution's Article 15, Section 3(2) term-limit provision providing that a person may not serve more than 12 years in any state office or as a member of any local governing body, reaffirming precedent concluding that the amendment was validly enacted, and ruling that 1) Article 15, Section 3(2) became effective on the canvass of November 27, 1996; 2) the

term-limit provision applies prospectively from that date; 3) the amendment applies to any individual who was elected to a term of office before the amendment's effective date but commenced serving in that office thereafter; and 4) any candidate for a state office or position on a local governing body, who, like real parties in interest, has served 12 years or more after the November 1996 effective date is barred by the term-limit amendment from further service in that position.

*Child v. Lomax*, 124 Nev. Adv. Op. No. 57 (July 25, 2008) – The Court denies an original petition for extraordinary relief seeking a writ of mandamus directing the Clark County Registrar of Voters to exclude real party in interest's name from the 2008 primary and general election ballots based on the Nevada Constitution's Article 4, Section 3(2) term-limit provision precluding State Assembly members from serving more than 12 years in office, ruling that 1) a petition for mandamus relief is appropriate for consideration; 2) the term-limit amendment is valid; 3) as the constitution provides that a State Assembly member's term of office begins on the day after the member's election and the State Assembly member who petitioner asserts has exceeded the 12-year term limitation began serving in that office on November 6, 1996—before the term-limit provision became effective on November 27, 1996—her term that began in 1996 does not count toward the 12-year limitation period; and 4) as calculated from the amendment's effective date, the candidate whose qualifications petitioner challenges on term-limit grounds will not have served in the State Assembly for 12 years or more by the time her current term expires.

*State, Bd. of Equalization v. Barta*, 124 Nev. Adv. Op. No. 58 (July 25, 2008) – On consolidated appeals from district court orders granting combined petitions for judicial review and complaints for relief, overturning a decision of the Nevada State Board of Equalization regarding parcels of Washoe County real property, the Court affirms, ruling that 1) the State Board erred by disregarding the Taxpayers' arguments that the Assessor used unconstitutional methods to determine the taxable values of their properties and by failing to recognize that a taxable value may be unjust and inequitable despite being less than the full cash value of the property; 2) thus, the Taxpayers met their burden of proving that the taxable values of their properties were unjust and inequitable by showing that, in assessing their properties, either by reappraising or factoring, the Assessor used methods or adjusted values declared unconstitutional in *State, Bd. of Equalization v. Bakst* [122 Nev. 1403, 148 P.3d 717 (2006)]; 3) nothing significant distinguishes these cases, factually or legally, from *Bakst*; 4) the district court properly granted judicial review, declared the Taxpayers' 2004-2005 assessments void, and set their assessed values for 2004-2005 to the 2002-2003 levels; and 5) the Taxpayers are entitled to refunds of all excess taxes paid and six percent annual interest.

*Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. Adv. Op. No. 59 (July 31, 2008) – The Court affirms a district court order denying a motion to compel arbitration, ruling that a nonsignatory to an arbitration agreement cannot be

required to submit an oral contract dispute to arbitration under an alter ego theory in this instance.

*Hernandez v. State*, 124 Nev. Adv. Op. No. 60 (July 31, 2008) – The Court reverses a jury conviction of first-degree murder with the use of a deadly weapon, ruling that the district court committed reversible error by granting the State’s motion to admit the preliminary hearing testimony of an absent witness, because it failed to require an affidavit or sworn testimony from the prosecutor to determine whether good cause existed to make an untimely motion for the admission of preliminary hearing testimony, and concluded that a single telephone call after the witness failed to appear as scheduled was a reasonable exercise of diligence to procure a witness’s attendance.

*Moseley v. Dist. Ct.*, 124 Nev. Adv. Op. No. 61 (July 31, 2008) – The Court grants in part a writ petition challenging a district court order that denied a motion to dismiss a party in a wrongful death action, ruling that 1) NRCP 25’s 90-day limitation to move for substitution of a deceased party’s successor is triggered when an opposing party files and serves a proper suggestion of death; 2) NRCP 6(b) can be used to extend the time within which to file a motion for substitution, under NRCP 25, when excusable neglect is established; and 3) it is not clear from the district court record whether the district court made a finding as to excusable neglect and on remand the district court should make a factual finding regarding whether excusable neglect was established.

*LVCVA v. Secretary of State*, 124 Nev. Adv. Op. No. 62 (September 4, 2008) – On consolidated appeals and cross-appeals from final judgments concerning whether three initiative petitions qualify for placement on the ballot, the Court affirms in part and dismisses in part, ruling that 1) the initiatives’ circulators’ affidavits do not substantially comply with the statutory requirements in that they completely failed to include two statements mandated by NRS 295.0575: first, they do not state the number of signatures on the document, and second, they do not state that each signer had an opportunity to read the full text of the initiative before signing; 2) the proponents’ efforts in the district court to cure the affidavits’ defects were insufficient because the proponents failed to make a valid offer of proof necessary to show whether the circulators nevertheless complied with the statute’s purposes; 3) the Court rejects the proponents’ First Amendment challenge to enforcement of NRS 295.0575’s affidavit requirements, as the United States Supreme Court has implicitly approved of requirements similar to those at issue here; and 4) the Court rejects the proponents’ argument that enforcement of the statute is barred by substantive due process concerns or estoppel. The Court affirms the district court’s judgment approving the decision of the Secretary of State to strike the signatures.

*Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. Adv. Op. No. 63 (September 11, 2008) – On a petition for rehearing of *Dutchess Business Services v. State, Board of Pharmacy*, 124 Nev. \_\_\_, 184 P.3d 397 (2008) (opinion withdrawn July 17, 2008), an appeal from a district court order denying judicial review of a Nevada State Board of Pharmacy decision, the Court grants the rehearing and affirms in part, ruling that: 1) because appellants held licenses

issued by the Board, the Board had jurisdiction under NRS 639.210 to discipline and impose penalties on them even if the acts supporting unprofessional conduct occurred outside the state; 2) as an administrative body, the Board was within its discretion to join appellants in a single action, and neither party was unduly prejudiced by the joinder; 3) appellants were not deprived of due process because they received adequate notice of the charges against them, they were not entitled to conduct discovery, and the Board adjudicated them guilty only of charges listed in the charging document; 4) the Board applied the proper legal standards in reaching all but one of its conclusions of law; 5) the Board's orders are not arbitrary and capricious; 6) the Board did not pierce either appellant's corporate veils to impose liability on their principals under an alter ego theory; and 7) because the statute in effect in 2003, NRS 639.233(2), exempted Overseas International from Nevada's licensing requirements, we conclude that the Board erred in determining that appellant Dutchess violated Nevada law by conducting business with Overseas.

*Countrywide Home Loans v. Thitchener*, 124 Nev. Adv. Op. No. 64 (September 11, 2008) – On an appeal and cross-appeal from a district court order in a breach of contract and tort action arising from improper foreclosure proceedings, the Court affirms in part and reverses in part, ruling on several compensatory and punitive damage award issues. With respect to compensatory damages, 1) since respondents/cross-appellants' actual losses did not exceed the damages that they incurred to their real and personal property, they were not entitled to recover separately under breach of contract and negligence theories in addition to theories of trespass and conversion; 2) the district court inappropriately trebled the jury's award for trespass and conversion as it relates to personal property; and 3) the remaining portions of the compensatory damages awarded are upheld. Regarding the punitive damage award, the award was supported by substantial evidence and affirmed; however, punitive damages jurisprudence is clarified as follows in light of NRS 42.001 [which defines implied malice as a distinct basis for punitive damages in Nevada and establishes a common mental element for implied malice and oppression based on conscious disregard]: 1) the Court overrules *Granite Construction v. Rhyne* [107 Nev. 651, 817 P.2d 711 (1991)] as a guide to determining the showing required to demonstrate conscious disregard under NRS 42.001(1); and 2) the Court retreats from past use of the term "unconscionable irresponsibility" to describe the outer limit of culpable conduct that would escape liability for punitive damages in Nevada. Separately, the Court rules that NRS 42.007 governs vicarious employer liability for punitive damages and overrules *Smith's Food & Drug Centers v. Bellegarde* [114 Nev. 602, 610, 958 P.2d 1208 (1998)] to the extent that its common law approach conflicts with this statute.

*Boulder City v. Boulder Excavating*, 124 Nev. Adv. Op. No. 65 (September 11, 2008) – The Court reverses a district court judgment holding a municipality liable in tort for requesting the removal of a subcontractor on a public works project bid and awarding damages, ruling that it is appropriate to afford government entities discretionary immunity under NRS 41.032(2) in the context of accepting and rejecting bids for public works projects: specifically, because the agent of the



government entity in this case was engaged in an act involving individual judgment based on policy considerations under NRS Chapter 338, within the scope of his employment, and because no independent theory of liability was advanced against the government entity, the government entity enjoys discretionary immunity from suit.

*Chartier v. State*, 124 Nev. Adv. Op. No. 66 (September 11, 2008) – The Court reverses a jury conviction of one count of conspiracy to commit murder and two counts of first-degree murder with the use of a deadly weapon, ruling that the district court abused its discretion in failing to sever appellant’s trial from that of his codefendant, and that appellant suffered unfair prejudice because the cumulative effect of the joint trial violated his right to a fair trial by preventing the jury from making a reliable judgment as to his guilt or innocence.

*Adaven Mgmt. v. Mountain Falls Acquisition*, 124 Nev. Adv. Op. No. 67 (September 11, 2008) – The Court affirms a district court summary judgment in a water rights action, ruling that summary judgment for respondent was appropriate because no genuine issue of material fact existed regarding whether appellant had notice of respondents’ prior recorded interest in the water rights at issue, and neither NRS 533.040 nor the anti-speculation doctrine limit the free alienability of water rights as separate property.

*Picetti v. State*, 124 Nev. Adv. Op. No. 68 (September 11, 2008) – The Court affirms a conviction, pursuant to a guilty plea, of one count of driving under the influence (DUI), third offense within 7 years, a class B felony, ruling that 1) the district court did not err when it denied appellant’s motion to suppress his first-offense and second-offense DUI convictions because the mass advisements and individual colloquies provided by the justice court respecting appellant’s guilty pleas were constitutionally sufficient, and as to appellant’s misdemeanor prior convictions, the justice court respected the spirit of constitutionality and properly informed appellant of his right to counsel; 2) NRS 484.37941, which allows certain third-time DUI offenders who plead guilty to apply for treatment and, upon successful completion of an approved treatment program, to be convicted of a misdemeanor DUI, applies to those defendants who entered their guilty pleas on or after July 1, 2007, and the district court did not err in denying appellant’s application for treatment before the statute’s effective date. Notably, the Court concludes that the provisions set forth in NRS 484.37941 are not of constitutional dimension; instead, the provisions merely give the district court discretion to allow a defendant to complete a treatment program in order to obtain a conviction and sentence for a lesser offense.

*Ferguson v. State*, 124 Nev. Adv. Op. No. 69 (September 11, 2008) – The Court reverses a jury conviction of one count each of burglary, sexual assault, robbery, and first-degree kidnapping, ruling that 1) under the Eighth Judicial District Court Rules (EDCR), the Eighth Judicial District may assign the determination of all initial competency matters (NRS 178.415 and NRS 178.455) to a particular district court judge; 2) the determination of a defendant’s ongoing competency thereafter and during trial must vest with the trial judge who has been assigned to hear the matter; 3) upon a defendant’s return from a mental health facility where

the defendant has been deemed competent to stand trial, the district court upon a timely request must afford the defendant a hearing wherein the defendant is afforded the opportunity to examine the members of the treatment team regarding their report; 4) a defendant's right to a hearing cannot be waived when the challenge is based on the defendant not having the sufficient present ability to consult with defense counsel with a reasonable degree of rational understanding or on the defendant not having a rational, as well as factual, understanding of the proceedings against him or her.

*Mitchell v. State*, 124 Nev. Adv. Op. No. 70 (September 18, 2008) – The Court affirms a conviction on bench trial of second-degree murder with the use of a deadly weapon, ruling that 1) when a defendant seeks to avoid criminal responsibility based upon the defense of insanity or battered-spouse syndrome, a district court may order an independent psychiatric examination; 2) by extension, a district court may order a psychiatric examination when a defendant claims that he or she reasonably acted in self-defense because of post-traumatic stress disorder; 3) the State may introduce the results of that examination as long as they are introduced only to rebut the defendant's post-traumatic stress disorder defense and they do not relate to the defendant's culpability for the charged crimes; 4) the prosecution introduced sufficient evidence for a rational trier of fact to find Mitchell guilty beyond a reasonable doubt; 5) the district court did not err when it allowed the State's cross-examination into the appellant's prior bad acts; 6) the district court did not abuse its discretion when it allowed certain expert testimony, even though the State failed to make the disclosures required by NRS 174.234(2), because the appellant failed to demonstrate bad faith in the State's failure to comply and further failed to demonstrate that his substantial rights were prejudiced; and 7) the district court did not err when it allowed the State's cross-examination about the psychiatric examination results.

*Barney v. Mt. Rose Heating & Air*, 124 Nev. Adv. Op. No. 71 (September 18, 2008) – The Court affirms in part and reverses in part postjudgment district court orders awarding attorney fees and denying a motion to enter satisfaction of the judgment in a mechanic's lien action, ruling that 1) NRS 108.237(1) covers all attorney fees incurred to enforce a mechanic's lien before the judgment is satisfied and the lien is discharged or released, and thus, any postjudgment attorney fees incidental to the lien's enforcement through foreclosure are available under that statute; 2) the district court abused its discretion by failing to provide any analysis or specific findings regarding the reasonableness of the fees awarded, and it appears that some of the fees awarded were not reasonable because they ostensibly pertained to matters unrelated to the mechanic's lien's enforcement through foreclosure or matters on which the lien claimant did not prevail; and 3) because a lien claimant is entitled to attorney fees incurred postjudgment under NRS 108.237(1) and a motion for such fees remained pending at the time payment in satisfaction of the judgment was tendered, the district court correctly refused to compel satisfaction of the judgment, since the payment only partially satisfied the judgment.

Canyon Villas v. State, Tax Comm'n, 124 Nev. Adv. Op. No. 72 (September 25, 2008) – The Court affirms a district court order denying petitions for judicial review of property tax valuations, ruling that the appropriate method for assessing the taxable value of income-producing real property when the property's improvements contain constructional defects is by adjusting the capitalization rates in the income capitalization method used under NRS 361.227(5)(c) to determine the properties' full cash value.

Ransdell v. Clark County, 124 Nev. Adv. Op. No. 73 (September 25, 2008) – The Court affirms a district court judgment in a civil action alleging various torts and constitutional violations following property abatement by Clark County, applying the federal two-part test adopted in *Martinez v. Maruszczak* [123 Nev. \_\_\_, 168 P.3d 720 (2007)] for determining whether the discretionary-function exception to the general waiver of sovereign immunity applies to protect a government entity from liability, and ruling that, because a county's decision and actions in declaring and abating a nuisance are discretionary in nature and are made in furtherance of public policy goals, such decisions and actions are immune from civil liability under NRS 41.032(2).

ANSE, Inc. v. Dist. Ct., 124 Nev. Adv. Op. No. 74 (September 25, 2008) – The Court denies a writ petition challenging a district court order denying partial summary judgment in a construction defect action, clarifying that a "new residence" under NRS 40.615 is one that has remained unoccupied as a dwelling from the completion of its construction to the point of its first sale; thereafter, subsequent owners of that residence, as claimants, may seek NRS Chapter 40's residential constructional defect remedies, so long as the action is instituted within the applicable statute of repose.

We the People Nevada v. Secretary of State, 124 Nev. Adv. Op. No. 75 (September 25, 2008) – The Court grants a writ petition challenging the constitutionality of NRS 295.056(3), which requires that an initiative petition proposing to amend the Nevada Constitution be submitted "not later than the third Tuesday in May of an even-numbered year", ruling that NRS 295.056(3) is unconstitutional insofar as the statute impermissibly restricts the powers reserved to the people under Article 19 by establishing a submission deadline earlier than what is otherwise permitted by Article 19, Sections 2(4) and 3(2) of Nevada's Constitution and thereby directly inhibiting the initiative process. Article 19, Section 3(2) provides that, for purposes of conducting preliminary signature verification, the Legislature may not require that initiatives be submitted more than 65 days earlier than what is otherwise required under Article 19. As regards what Article 19 "otherwise requires," Section 2(4) states that circulators of initiatives have until 90 days before the general election to file their initiative with the Secretary of State. Taken together, the submission deadline for signature verification may not be set earlier than 155 days from the general election. Because NRS 295.056(3) impermissibly established a submission deadline earlier than what is otherwise permitted, *i.e.*, May 20, that provision is unconstitutional, and the June 17, 2008, deadline under that provision's former version remains in effect.

Davidson v. State, 124 Nev. Adv. Op. No. 76 (October 2, 2008) – The Court affirms in part and reverses in part a jury conviction of two counts of burglary, one count of robbery, one count of robbery with the victim being 60 years of age or older, two counts of battery with substantial bodily harm, and adjudication as a habitual criminal, ruling that 1) the Double Jeopardy Clause prohibits the district court from changing the jury’s verdict from not guilty to guilty for a criminal charge after the jury has been discharged, even if the change is only to correct a purported clerical error; 2) the district court in this case erred by changing the verdict for the robbery charge at issue from not guilty to guilty and one of the robbery convictions is reversed; 3) regarding the judgment and sentence for battery, the judgment of conviction erroneously treats one of the battery convictions (count four) as a felony when the jury returned a finding of guilt for a misdemeanor on that count; 4) as a result, the district court erred in imposing a habitual criminal sentence for that count because NRS 207.010 authorizes a habitual criminal sentencing enhancement for convictions of crimes involving fraud or intent to defraud, of petit larceny, or of a felony; and 5) on remand the district court shall amend the judgment of conviction to show that count four is a misdemeanor and to impose a lawful sentence for that count.

M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. Adv. Op. No. 77 (October 2, 2008) – The Court affirms in part and dismisses in part a district court order entered on a jury verdict in a contract and tort action, ruling that a contractor’s license constitutes intangible personal property that can be converted under Nevada law, adopting the California definition of “property rights” and the Restatement (Second) of Torts rule defining conversion of “intangible personal property,” and expressly rejecting the notion that personal property must be tangible in order to give rise to a conversion claim. In so ruling, the Court concludes that 1) although the use of a contractor’s license by one individual does not physically prevent others from using the same contractor’s license, unauthorized use of such a license in contravention of the license holder’s rights may give rise to a cognizable conversion claim; 2) the exercise of a right that belongs to another may constitute an act inconsistent with the titleholder’s rights and may therefore satisfy the “wrongful dominion” element of conversion; and 3) the use of a corporate contractor’s license by an individual for independent projects, without the permission of the entity named in the license, may constitute a conversion when the license is the exclusive property of the individual or entity to which it is issued.

Cox v. Dist. Ct., 124 Nev. Adv. Op. No. 78 (October 2, 2008) – The Court grants a writ petition in a case concerning a complaint for partition or sale of certain Clark County real property, ruling that 1) bona fide purchasers at judicial sales are not protected under the general principle that judicial sales survive appellate reversals if the district court lacked jurisdiction to order the sale; 2) in this situation, judicial sales may be challenged collaterally or in remanded proceedings in the original action; 3) here, before ordering petitioners’ property sold in the partition action, the district court improperly denied petitioners’ motion to dismiss the action pursuant to NRCP 41(e)’s requirement that an action be brought to trial within five years from the date that a complaint is filed; 4) after the

five-year deadline for bringing the case to trial expired, dismissal was mandatory under that rule; and 5) the district court lacked jurisdiction to take the partition action to judgment and order the judicial sale of petitioners' real property, and the judicial sale is void.

*Knipes v. State*, 124 Nev. Adv. Op. No. 79 (October 2, 2008) – The Court affirms a jury conviction of driving under the influence causing death, ruling that 1) hearings to determine the admissibility of juror questions should be conducted on the record as part of the procedural safeguards prescribed in *Flores v. State* [114 Nev. 910, 965 P.2d 901 (1998)]; 2) the failure to properly administer the required procedural safeguards for juror questioning amounts to nonconstitutional trial error, subject to harmless-error review under NRS 178.598; and 3) although the district court entertained juror questions improperly in certain respects, asking the improperly vetted questions at trial was harmless since none of the questions elicited testimony that prejudicially impacted the jury's verdict.

*Winchell v. Schiff*, 124 Nev. Adv. Op. No. 80 (October 9, 2008) – The Court affirms in part and reverses in part a district court judgment entered on a jury verdict in a conversion/lease action, ruling that full recovery for actual losses resulting from the conversion of inventory includes not only the converted inventory, but also resulting damages such as the value of a lost business.

*Baldonado v. Wynn Las Vegas*, 124 Nev. Adv. Op. No. 81 (October 9, 2008) – On consolidated appeals from a district court order granting summary judgment on statutory, contract, and declaratory relief claims in a class action employment law matter and from a post-judgment order denying attorney fees and costs, the Court affirms, ruling that 1) since Nevada labor laws are to be enforced by the Labor Commissioner, who generally must hear and decide complaints that arise under those law, no private cause of action exists to enforce NRS 608.160, NRS 608.100, or NRS 613.120; 2) in light of an available statutory remedy, appellants have no standing to independently seek declaratory relief regarding those statutes' application; 3) regarding appellants' breach of contract claim, they failed to demonstrate a genuine issue of material fact and the district court properly granted the Wynn's motion for summary judgment and denied appellants' motion for partial summary judgment; and 4) as appellants had reasonable grounds on which to assert their claims, the district court did not abuse its discretion in refusing to award attorney fees.

*State v. Harte*, 124 Nev. Adv. Op. No. 82 (October 30, 2008) – The Court affirms a district court order partially granting a post-conviction petition for a writ of habeas corpus in a death penalty case, rejecting the State's contention that *McConnell v. State* [120 Nev. 1043, 102 P.3d 606 (2004) (holding that it is unconstitutional to base aggravating circumstance in capital prosecution on felony that was used to obtain first-degree murder conviction), rehearing denied, 121 Nev. 25, 107 P.3d 1287 (2005)] was wrongly decided and concluding that a new penalty hearing is the proper remedy in cases where the sole aggravating circumstance has been struck.

Hernandez v. State, 124 Nev. Adv. Op. No. 83 (October 30, 2008) – The Court affirms a district court order denying a post-conviction petition for a writ of habeas corpus, ruling that 1) *McConnell v. State* [120 Nev. 1043, 102 P.3d 606 (2004) (holding that it is unconstitutional to base aggravating circumstance in capital prosecution on felony that was used to obtain first-degree murder conviction), rehearing denied, 121 Nev. 25, 107 P.3d 1287 (2005)] does not preclude the State from securing a murder conviction based upon a theory of torture and alleging torture as an aggravating circumstance in seeking a death sentence, since Nevada’s definition of torture murder sufficiently narrows the class of persons eligible for the death penalty to allow the dual use of torture as exercised in this case; 2) *McConnell* does require that the burglary aggravating circumstance be stricken, leaving two remaining aggravating circumstances—the murder involved torture or mutilation and the defendant subjected the victim to nonconsensual sexual penetration; 3) after reweighing the remaining aggravating and mitigating evidence, it is beyond a reasonable doubt that the jury would have found appellant death eligible and imposed a death sentence in the absence of the erroneous aggravating circumstance; and 4) the district court did not err in rejecting appellant’s other post-conviction claims.

Rivero v. Rivero, 124 Nev. Adv. Op. No. 84 (October 30, 2008) – The Court affirms in part and reverses in part a district court post-divorce decree order modifying a joint child custody award, adopting in pertinent part this definition of joint physical custody:

“Joint physical custody” means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents.

The Court further rules that 1) the district court abused its discretion when it determined, without making specific findings of fact, that the parties had joint physical custody and when it modified the custody arrangement set forth in the divorce decree (remanded for further proceeding consistent with opinion); 2) the district court abused its discretion in denying Ms. Rivero’s motion to modify child support because it did not set forth specific findings of fact to justify deviating from the statutory child support formulas (remanded for further proceeding consistent with opinion); 3) the judge properly refused to recuse herself, and the district court properly denied Ms. Rivero’s motion for disqualification; and 4) the district court did not abuse its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero’s motion to disqualify the judge (affirming the district court’s orders regarding the recusal, disqualification, and attorney fees).

Cook v. Sunrise Hospital & Medical Center, 124 Nev. Adv. Op. No. 85 (October 30, 2008) – On consolidated appeals from a district court judgment on a jury verdict in a medical malpractice action and a post-judgment order awarding costs, the Court reverses, ruling that 1) appellants preserved for review their

objection to respondent's proposed "mere happening" jury instruction because the objection placed the district court on notice that the instruction's language required further review; 2) the jury instruction that "the mere fact that an unfortunate or bad condition resulted to the patient involved in this case does not prove, or even imply, that by virtue of that fact, the defendant is negligent" misstated Nevada law because the instruction failed to inform the jury that it could consider all of the circumstances leading to the plaintiff's injury as possible evidence of the defendant's negligence, and thus, the instruction may have confused or misled the jury to its verdict (citing *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962)); 3) appellants have proven that the inaccurate instruction was prejudicial rather than harmless error because, but for the mistake in instructing the jury, it is probable that a different result may have been reached as the case was close and appellants introduced evidence that could support a finding of negligence against respondent; and 4) because the given jury instruction misstated the law, which could have confused or misled the jury, and appellants have met their burden of showing prejudice, the district court's judgment and order awarding costs and fees to respondent are reversed.

*Cortinas v. State*, 124 Nev. Adv. Op. No. 86 (October 30, 2008) – The Court affirms 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 1) harmless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability, retreating from the absolute certainty approach to *Stromberg* error [*Stromberg v. California*, 283 U.S. 359, 368 (1931)] adopted in *Bolden v. State* [121 Nev. 908, 924, 124 P.3d 191, 201 (2005)] and concluding that the *Chapman* standard of harmless-error review [*Chapman v. California*, 386 U.S. 18, 24 (1967)] applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability (reaffirming *Nay v. State*, 123 Nev. \_\_\_, \_\_\_, 167 P.3d 430, 435 (2007)); 2) it is beyond a reasonable doubt that the jury would have returned the same first-degree murder verdict had it not been misled that an afterthought robbery could satisfy the felony-murder rule, and given the overwhelming evidence presented at trial and the jury's actual findings, presenting the jury with an invalid theory of felony murder was harmless error; and 3) the general intent and the taking required for robbery may occur after a victim is deceased so long as the use of force or coercion by the defendant—for whatever purpose—occurred while the victim was alive and the defendant took advantage of the terrifying situation he created to flee with the victim's property, and thus the district court did not improperly instruct the jury with regard to robbery.

*Rubio v. State*, 124 Nev. Adv. Op. No. 87 (October 30, 2008) – The Court affirms in part and reverses in part a district court order denying a post-conviction motion to withdraw a guilty plea, adopting in pertinent part the affirmative misrepresentation exception to the collateral consequence rule, and ruling that 1) while deportation is a collateral consequence that does not affect the voluntariness of a guilty plea (*Barajas v. State*, 115 Nev. 440, 442, 991 P.2d 474, 475-76 (1999)), affirmative misrepresentation of immigration consequences by

counsel is an exception to that general rule and may provide grounds for attacking the voluntariness of the plea, because counsel who affirmatively misrepresents the immigration consequences of a guilty plea provides objectively unreasonable representation, meeting the first prong of the *Strickland* test for ineffective assistance of counsel (*Strickland v. Washington*, 466 U.S. 668 (1984)); 2) the affirmative misrepresentation exception to the rule does not extend to misrepresentations by a court interpreter, and such misrepresentations will not be imputed to counsel; 3) because appellant failed to allege affirmative misrepresentation by counsel, this exception provides her no relief; however 4) the district court abused its discretion by not holding an evidentiary hearing on appellant's claims that counsel abandoned her to the interpreter, and thus failed to provide effective assistance.

*Five Star Capital Corp. v. Ruby*, 124 Nev. Adv. Op. No. 88 (October 30, 2008) – The Court affirms a district court summary judgment in a real estate sales contract action, ruling that claim preclusion applies to prevent a party from bringing a second lawsuit when the first lawsuit was dismissed under a local court rule for failure to attend a pretrial calendar call. Notably, the Court clarifies the proper tests for determining when claim preclusion or issue preclusion applies, establishing this three-part test for determining whether claim preclusion should apply: 1) the parties or their privies are the same, 2) the final judgment is valid, and 3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case; and establishing these four factors for application of issue preclusion: 1) the issue decided in the prior litigation must be identical to the issue presented in the current action, 2) the initial ruling must have been on the merits and have become final, 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and 4) the issue was actually and necessarily litigated. Thus, while claim preclusion can apply to all claims that were or could have been raised in the initial case, issue preclusion only applies to issues that were actually and necessarily litigated and on which there was a final decision on the merits. The reason for this distinction is because claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit, while issue preclusion applies to prevent relitigation of only a specific issue that was decided in a previous suit between the parties, even if the second suit is based on different causes of action and different circumstances.

*Estate of LoMastro v. American Family Ins.*, 124 Nev. Adv. Op. No. 89 (October 30, 2008) – The Court affirms in part, reverses in part, and dismisses in part a district court judgment in an insurance matter and from a post-judgment order denying an NRCP 60(b) motion to set aside the judgment, ruling in pertinent part that 1) entry of default binds an insurance company intervenor as to the liability of an uninsured motorist defendant if the insurance company had notice of the litigation and the plaintiff's intent to seek entry of default, but failed to intervene before a default was entered; and 2) Nevada law does not always require physical contact between an uninsured motorist and the insured or the insured's vehicle, and uninsured motorist coverage may apply to single-vehicle accidents,



since uninsured motorist benefits are available when an insured person is legally entitled to recover from the owner or operator of a vehicle that meets one of NRS 690B.020(3)'s statutory definitions for uninsured motor vehicle, and the "physical contact" requirement only applies to cases in which an unidentified or hit-and-run driver, as defined in NRS 690B.020(3)(f), is alleged to be negligent.

Village League v. State, Bd. of Equalization, 124 Nev. Adv. Op. No. 90 (October 30, 2008) – The Court grants in part a writ petition challenging the Nevada State Board of Equalization's review and remand of the Washoe County Board of Equalization's determination to equalize certain taxable valuations arising out of an ongoing conflict between respondent the Nevada State Board of Equalization, real party in interest the Washoe County Assessor, and taxpayers from the Incline Village and Crystal Bay areas, ruling that 1) the State Board had jurisdiction to hear the appeal from the County Board's general equalization decision, even though the statutory deadline had expired, because that deadline is directory, meaning that it is advisory rather than compulsory; 2) the State Board has discretion to remand a matter to a county board only when the record before the State Board is inadequate because of "an act or omission of the county assessor, the district attorney or the county board of equalization" [NRS 361.360(6)]; and 3) in this case, the County Board's minutes were sufficient to enable the State Board's review and the State Board arbitrarily remanded the matter.

Mesagate HOA v. City of Fernley, 124 Nev. Adv. Op. No. 91 (October 30, 2008) – The Court affirms a district court order denying a petition for a writ of mandamus that challenged a building permit issued for a water treatment plant, ruling that appellants failed to exhaust their administrative remedies by not appealing the approval of the City's building permit to the Board of Appeals established by the Fernley Development Code pursuant to NRS 278.3195, thus, judicial review is improper, and the issues raised by appellants' petition for a writ of mandamus are nonjusticiable.

Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. Adv. Op. No. 92 (October 30, 2008) – On a petition for rehearing of *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. \_\_\_, 185 P.3d 1055 (2008), in consolidated appeals from a district court judgment entered on a jury verdict in a contract and lien dispute action and from post-judgment orders denying a new trial and awarding attorney fees and costs, the Court, while denying rehearing, withdraws the June 12, 2008, opinion and issues this opinion in its place on the basis that a portion of the prior opinion could be misconstrued as being contrary to precedent. The Court reaches the same conclusions as in the prior opinion, but clarifies its reasoning for reversing the district court's judgment on the breach of contract claim regarding the retrofit issue and for remanding that matter to the district court for a new trial, ruling in pertinent part that, pursuant to NRCP 49(b), the district court shall not enter judgment on irreconcilably inconsistent verdicts, and the district court therefore abused its discretion when it entered judgment on the inconsistent answers to the special interrogatories and the general verdict

Waldman v. Maini, 124 Nev. Adv. Op. No. 93 (November 6, 2008) – The Court affirms in part and reverses in part a district court judgment in a wills and probate matter, ruling that 1) under constructive trust and resulting trust principles, a corporation may acquire an ownership interest in life insurance policies by paying the premiums; 2) under the resulting trust doctrine a company acquiring equitable ownership of a life insurance policy must show that it has an insurable interest in the life of the insured to recover the proceeds; 3) in the case of simultaneous death, the Uniform Simultaneous Death Act applies to the distribution of property when a decedent's will or life insurance policy provides for a property distribution that is the same as that provided for by the Uniform Act; and 4) when the Uniform Act applies, it creates a statutory presumption that an insured survived his or her simultaneously deceased beneficiaries and this presumption controls the distribution of life insurance proceeds through the distribution of the insured's estate even though the policy may be community property.

Olivares v. State, 124 Nev. Adv. Op. No. 94 (November 20, 2008) – The Court reverses a judgment on a jury conviction of first-degree murder with the use of a deadly weapon, ruling that 1) when doubts have been raised as to a defendant's competency to stand trial, the district court has an obligation to hold a hearing to fully consider those doubts and to determine whether further competency proceedings under NRS 178.415 are warranted; 2) in addition to the doubts that have been raised, the district court may consider all available information, including any prior competency reports and any new information calling the defendant's competency into question; and 3) in this case it was an abuse of discretion for the district court to decline to hold a hearing to consider the doubts raised by counsel on the eve of trial concerning defendant's competency and to determine whether further competency proceedings were necessary.

In re William M., 124 Nev. Adv. Op. No. 95 (November 26, 2008) – On consolidated appeals from juvenile court orders certifying appellants for criminal proceedings as adults on charges involving the use of firearms, the Court reverses, ruling that 1) the Fifth Amendment right against self-incrimination is available to juveniles in certification proceedings under the United States Supreme Court's decision in *In re Gault* [387 U.S. 1 (1967)]; 2) the portion of *Marvin v. State* [95 Nev. 836, 603 P.2d 1056 (1979)] that improperly concluded that the Fifth Amendment right against self-incrimination did not apply to juveniles in waiver proceedings is overruled; and 3) by requiring a juvenile to admit to the charged criminal conduct in order to overcome the presumption of adult certification, the presumptive certification statute, NRS 62B.390(2) and (3), violates the juvenile's Fifth Amendment right against self-incrimination.

Boucher v. Shaw, 124 Nev. Adv. Op. No. 96 (November 26, 2008) – On a question certified under NRAP 5 from the United States Court of Appeals for the Ninth Circuit, concerning whether, under NRS Chapter 608, individual managers can be held liable as employers for unpaid wages, the Court answers the question in the negative and concludes that individual managers cannot be held personally liable for unpaid wages under NRS Chapter 608.

Valdez v. State, 124 Nev. Adv. Op. No. 97 (November 26, 2008) - The Court reverses a jury conviction of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon in a case where, when the jury returned the guilty verdict, it also announced that it had decided the sentence, and the defendant subsequently agreed to waive his right to a penalty hearing and stipulated to a sentence of life without the possibility of parole for first-degree murder and an equal and consecutive term for the use of a deadly weapon. In reversing the conviction, the Court rules that 1) the district court erred by failing, pursuant to NRS 175.552(1) and NRS 175.161(1), to instruct the jury in writing, after the close of argument, that it was not to deliberate as to defendant's possible penalty until after the sentencing hearing; 2) the jury disobeyed the district court's oral instruction and therefore committed misconduct; 3) this misconduct deprived defendant of his constitutional rights, and the district court, therefore, abused its discretion in denying a mistrial based on this misconduct; 4) constitutional and nonconstitutional errors resulting from prosecutorial misconduct are subject to different harmless-error standards, and determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct; 5) the prosecutors engaged in several instances of misconduct throughout the trial but the individual instances of prosecutorial misconduct do not require reversal; and 6) although the evidence of guilt was substantial, it was not overwhelming, and considering the jury instruction error, the juror misconduct, and the prosecutorial misconduct, these errors denied defendant a fair trial.

Settelmeyer & Sons v. Smith & Harmer, 124 Nev. Adv. Op. No. 98 (December 24, 2008) – On consolidated appeals challenging a district court judgment concerning unpaid attorney fees, a post-judgment order awarding attorney fees, and a final judgment in a garnishment proceeding, the Court affirms in part and reverses in part, ruling that 1) jurisdiction exists over the receiver's appeal from the district court's order on garnishment because that order constituted the final judgment in the garnishment proceeding, in which the receiver was named and served as the garnishee defendant, and by which he was aggrieved; 2) the district court did not abuse its discretion in awarding respondent the attorney fees it incurred in the dissolution action because a firm may liquidate its claim for attorney fees in a court separate from the receivership court and the receivership court had not already adjudicated that precise claim on its merits (judgment affirmed); 3) the district court's garnishment and disbursement orders were improper, however, because only the receivership court has the authority to direct the receiver to pay respondent's judgment (garnishment and disbursement order reversed); and 4) the district court abused its discretion in awarding post-judgment attorney fees under the offer of judgment protocol because respondent is not entitled to fees for representing itself (post-judgment order awarding attorney fees and costs reversed).

Howell v. State Engineer, 124 Nev. Adv. Op. No. 99 (December 24, 2008) – The Court affirms a district court order denying appellants' petition for a writ of mandamus or judicial review, challenging the State Engineer's refusal to adjudicate title to certain water rights, ruling that 1) because NRS 533.450(1)

provides for judicial review of any decision made by the State Engineer, a State Engineer decision that is communicated in a letter is sufficient for review so long as it is a final determination that affects a person's interests concerning a determination of rights; 2) pursuant to NRS 533.450(1), final State Engineer decisions are subject to judicial review; therefore, mandamus relief is inappropriate; 3) the State Engineer has never had authority to resolve questions of title, title questions must be resolved by a quiet title action in district court pursuant to NRS 533.024(2), and seeking resolution through a petition for judicial review is improper; and 4) although the district court resolved this matter on different grounds, the district court's denial of the petition for judicial review is affirmed because the district court's decision reached the correct result.

In re Lerner, 124 Nev. Adv. Op. No. 100 (December 24, 2008) – In an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Glen Lerner receive a public reprimand for violating Nevada Rule of Professional Conduct 5.5, which prohibits a lawyer from assisting in the unauthorized practice of law, the Court issues a public reprimand, ruling that 1) what constitutes the "practice of law" must be determined on a case-by-case basis, in light of the "touchstone" principle that the practice of law includes activities calling for the exercise of trained judgment in applying the general body of legal knowledge to the specific problem of a client and recommending a course of action; 2) in this case, based on ample authority from other jurisdictions, Lerner's employee, who was a licensed attorney in Arizona but not in Nevada, engaged in the practice of law; 3) since the employee's conduct was not incidental to his representation of clients in his licensing jurisdiction, his conduct was unauthorized; 4) Lerner assisted in his employee's unauthorized practice, which was undertaken in accordance with Lerner's usual policies and practices, and therefore Lerner violated RPC 5.5; and 5) for this violation, a public reprimand is the appropriate discipline.

Sheriff v. Burcham, 124 Nev. Adv. Op. No. 101 (December 24, 2008) – The Court reverses a district court order granting in part a pretrial petition for a writ of habeas corpus and dismissing a charge of driving and/or being in actual control of a vehicle while under the influence of alcohol and causing death and/or substantial bodily harm, ruling that 1) Cotter v. State [103 Nev. 303, 738 P.2d 506 (1987)] establishes the proper standard for NRS 484.3795(1)(a) in requiring that the State establish that the defendant was impaired to such a degree that he was incapable of driving safely; 2) in this case the State presented sufficient evidence to support a reasonable inference that defendant was under the influence; 3) expert testimony regarding retrograde extrapolation is not required in grand jury proceedings when a charge under NRS 484.3795(1)(b) is based on evidence that the defendant's blood-alcohol concentration (BAC) was tested twice within a reasonable time after the collision, was lower in the second test, and was below 0.08; 4) the grand jury could have reasonably inferred from defendant's BACs that his BAC was 0.08 or more at the time of the collision, and thus sufficient evidence supports the grand jury's indictment based on the theory that he violated NRS 484.3795(1)(b); and 5) therefore, the district court erred

when it partially granted defendant's writ petition and dismissed the charge for violation of NRS 484.3795.

*Nellis Motors v. State*, DMV, 124 Nev. Adv. Op. No. 102 (December 24, 2008) – The Court affirms a district court order denying a petition for judicial review in a Department of Motor Vehicles emissions-related license revocation matter, ruling that 1) the required evidentiary standard for administratively revoking emission-inspector and emission-station licenses is by preponderance of the evidence; and 2) there was substantial evidence in this matter to revoke appellants' licenses.

*Nika v. State*, 124 Nev. Adv. Op. No. 103 (December 31, 2008) – The Court affirms a district court order granting a motion to dismiss a post-conviction petition for a writ of habeas corpus in a death penalty case, ruling that 1) *Byford v. State* [116 Nev. 215, 994 P.2d 700 (2000)] announced a change in state law concerning a jury instruction defining premeditation, commonly referred to as the *Kazalyn* instruction [*Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992)], that applies prospectively to murder convictions that were not final when *Byford* was decided; 2) appellant's conviction was final before *Byford* was decided; 3) consequently, appellant's trial and appellate counsel were not ineffective for failing to challenge the *Kazalyn* instruction as that instruction was a correct statement of the law at the time of his trial; and 4) none of appellant's other claims raised on appeal warrant relief.