2009 Nevada Supreme Court Opinion Digest

Stromberg v. Dist. Ct., 125 Nev. Adv. Op. No. 1 (January 29, 2009) – The Court grant a writ petition challenging a district court's decision to deny petitioner's request to apply for treatment pursuant to NRS 484.37941, which allows a district court to accept a plea of guilty to a third-offense DUI and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program, ruling that 1) the plain language of NRS 484.37941 permits third-time DUI offenders who entered guilty pleas on or after July 1, 2007, to apply for treatment pursuant to the statute (reaffirming Picetti v. State, 124 Nev. ___, 192 P.3d 704 (2008)); and 2) NRS 484.37941 does not violate the separation-of-powers doctrine by giving the district court powers that are reserved to the prosecutor.

Savage v. Dist. Ct., 125 Nev. Adv. Op. No. 2 (January 29, 2009) – The Court grants consolidated writ petitions that challenge district court refusals to consider applications for treatment pursuant to NRS 484.37941, ruling that 1) the plain language of NRS 484.37941 requires the district court to consider the merits of an offender's application for treatment; 2) NRS 484.37941 does not require counties to create a "program of treatment" – rather, the statute only requires district courts to oversee the procedures and conditions of probation imposed upon the offender at the time the district court accepts the offender's application for treatment; 3) the district court has jurisdiction to order the Division of Parole and Probation to supervise any offenders whose applications for treatment are granted pursuant to NRS 484.37941; and 4) NRS 484.37941 does not violate the separation-of-powers doctrine.

Stalk v. Mushkin, 125 Nev. Adv. Op. No. 3 (January 29, 2009) – The Court affirms in part and reverses in part a district court summary judgment in a tort action, considering which statutes of limitation apply to claims for intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty arising from an attorney-client relationship. The Court rules that 1) claims for intentional interference with prospective business advantage and contractual relations are claims for injuring personal property and are subject to the three-year statute of limitations in NRS 11.190(3)(c); 2) a claim for breach of fiduciary duty arising from an attorney-client relationship is a legal malpractice claim and is therefore subject to the statute of limitations contained in NRS 11.207(1); and 3) based on these determinations, the district court's summary judgment on the claims for intentional interference with prospective business advantage and contractual relations is affirmed, and the district court's summary judgment on the claim for breach of fiduciary duty arising from the attorney-client relationship is reversed.

State, Dep't of Motor Vehicles v. Terracin, 125 Nev. Adv. Op. No. 4 (January 29, 2009) – On consolidated appeals from district court orders granting petitions for judicial review concerning the administrative revocation of respondents' driving privileges, the Court affirms the district court's orders granting judicial review and reducing the period of revocation of respondents' driver's licenses from 1 year to

90 days, ruling that the plain and unambiguous language of NRS 483.460 bases the period of revocation on the level of punishment prescribed by NRS 484.3792.

Attorney General v. Dist. Ct. (Philip Morris), 125 Nev. Adv. Op. No. 5 (January 29, 2009) – The Court denies a writ petition challenging a district court order granting a motion to compel arbitration, ruling that, under Master Settlement Agreement between tobacco manufacturers and 46 states including Nevada, issues concerning the adjustment of Nevada's annual payment from the tobacco companies based on Nevada's enforcement of its qualifying statute (NRS 370A.140) must be arbitrated.

Garcia v. Scolari's Food & Drug, 125 Nev. Adv. Op. No. 6 (January 29, 2009) – The Court affirms a district court order denying a petition for judicial review in an occupational disease matter, ruling that 1) good reasons do not exist under NRS 233B.131(2) to remand an administrative matter to the appeals officer for reconsideration with additional evidence when a party's attorney deliberately or negligently decides not to present available evidence during the course of the administrative proceeding and that party then seeks to have that evidence considered after an adverse decision has issued at the administrative level; 2) the district court did not abuse its discretion in determining that good reasons did not exist to remand this matter to the appeals officer and 3) based upon the evidence presented in the record, substantial evidence supports the appeals officer's decision denying appellant's occupational disease claim.

Collins v. State, 125 Nev. Adv. Op. No. 7 (March 5, 2009) – The Court affirms a jury conviction of one count each of robbery, intimidating a public officer, and battery with substantial bodily harm, ruling that NRS 0.060(2), which defines "substantial bodily harm" as "prolonged physical pain," is not unconstitutionally vague.

Terracon Consultants v. Mandalay Resort, 125 Nev. Adv. Op. No. 8 (March 26, 2009) – The Court answers certified questions from the U.S. District Court for the District of Nevada, pursuant to NRAP 5, regarding the scope of Nevada's economic loss doctrine, concluding that, in a commercial property construction defect action in which the plaintiffs seek to recover purely economic losses through negligence-based claims, the economic loss doctrine applies to bar such claims against design professionals who have provided professional services in the commercial property development or improvement process.

Mack v. Estate of Mack, 125 Nev. Adv. Op. No. 9 (March 26, 2009) – The Court affirms a district court's nunc pro tunc order regarding the division of marital assets in the divorce of Charla and Darren Mack, ruling that 1) the Court may take judicial notice of the outcome of a murder trial in which the deceased stood to gain financially from her killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled; 2) a nunc pro tunc order was appropriate in this case when one spouse died before the oral record was memorialized in an order; 3) the district court properly issued a Qualified Domestic Relations Order (QDRO) during Charla's lifetime which gave Charla a recognized right to receive a portion of Darren's ERISA pension plan;

and 4) Nevada's slayer statute is not preempted by ERISA and Darren may not benefit from his wrongful act of killing Charla (affirming the district court order with respect to the lump-sum payment to Charla from Darren's ERISA pension plan).

In re Application of Shin, 125 Nev. Adv. Op. No. 10 (March 26, 2009) – The Court affirms a district court order setting aside as void an order sealing a criminal record, ruling that NRS 179.245(5), which prohibits Nevada courts from sealing records concerning sexually based offenses, does not unconstitutionally abridge the power of the State Board of Pardons Commissioners to issue pardons under Article 5, Section 14 of the Nevada Constitution, since expunction is not a civil right contemplated within the scope of the constitutional pardoning power; therefore, the district court did not abuse its discretion when it set aside a prior order sealing a criminal record.

Karcher Firestopping v. Meadow Valley Contr., 125 Nev. Adv. Op. No. 11 (April 16, 2009) – The Court dismisses an appeal seeking review of a district court order that granted a motion to vacate an arbitration award, referred the matter back to arbitration for further proceedings, and denied a motion to confirm the award, ruling that, under the plain language of NRS 38.247(1)(e), the Court lacks jurisdiction to consider appeals challenging such orders.

Scarbo v. Dist. Ct., 125 Nev. Adv. Op. No. 12 (April 30, 2009) – The Court grants consolidated original petitions for writs of mandamus challenging district court orders denying petitioners' requests for competency reports, ruling that, prior to a competency hearing held pursuant to NRS 178.415, full and complete copies of the competency examination reports shall be delivered to the office of the district attorney and to defense counsel, or to the defendant personally if not represented by counsel. Accordingly, we grant these petitions for extraordinary relief.

Sims v. Dist. Ct., 125 Nev. Adv. Op. No. 13 (April 30, 2009) – The Court grants consolidated original petitions for writs of mandamus challenging district court orders denying petitioners' requests for competency reports, ruling that NRS 178.415(3) provides that the prosecuting attorney and defense counsel may introduce other evidence, including independent competency evaluations, if the evidence is relevant to the issue of competency; consequently, the petitioners are entitled to introduce their independent competency evaluations during the competency hearing since the evaluations are relevant to the issue of competency and the probative value of this information is not outweighed by NRS 48.035(2).

Allstate Insurance Co. v. Fackett, 125 Nev. Adv. Op. No. 14 (April 30, 2009) – The Court reverses a district court summary judgment in a declaratory relief action regarding an uninsured/underinsured motorist insurance matter, ruling that the Allstate insurance policy in question was unambiguous and its provision limiting uninsured/underinsured motorist (UM) coverage to insureds who suffer bodily injury is consistent with the plain language of NRS 687B.145(2), which does not extend coverage to noninsured third parties.

Hannon v. State, 125 Nev. Adv. Op. No. 15 (May 21, 2009) – The Court reverses a conviction, pursuant to a plea of nolo contendere, of one count of possession of a controlled substance, ruling that the district court erred in denying appellant's motion to suppress the evidence of marijuana recovered during a subsequent search, on the basis that no emergency reason existed for a warrantless entry into a private residence. In so ruling, the Court brings the standard for emergency home entries into conformity with the recent United States Supreme Court decision in Brigham City v. Stuart, 547 U.S. 398, 404 (2006). Under that standard, the Court concluded the warrantless entry into appellant's apartment was unlawful as there was no objectively reasonable basis to believe that the two occupants or any undisclosed third party may have been in danger inside.

Hartford Fire v. Trustees of Constr. Indus., 125 Nev. Adv. Op. No. 16 (May 28, 2009) - On certified questions under NRAP 5 from the Ninth Circuit Court of Appeals in an action to recover unpaid trust contributions from a contractor and a surety, the Court rules that 1) under NRS 339.035's clear terms, a subcontractor's employees are required to provide notice to the general contractor of their claims for the subcontractor's unpaid contributions before recovering on the contractor's payment bond; 2) because employee-benefit trust-fund trustees are third-party beneficiaries of the subcontractor's promise to make the contributions, we conclude that they represent the employees and, thus, are permitted to make claims on the payment bond; 3) since the trustees stand in the employees' shoes, they also are required to provide the contactor with notice of their claims before recovering against the payment bond under NRS 339.035; and 4) as NRS 608.150 plainly does not require that the trustees provide the contractor with notice of their claims before recovering from the contractor, no such notice is necessary to recover under that statute. The Court thus answers the Ninth Circuit's questions by concluding that trustees must provide NRS 339.035 notice as to claims against a surety under that chapter, but not as to claims against a contractor under NRS 608.150.

Las Vegas Taxpayer Comm. v. City Council, 125 Nev. Adv. Op. No. 17 (May 28, 2009) – The Court affirms a district court order denying declaratory, injunctive, and extraordinary writ relief as to a municipal initiative and referendum, ruling that 1) upon certification by the City Clerk that the proposed measures had sufficient signatures and otherwise met procedural requirements, the City Council had a duty to place the measures on the ballot, regardless of its objections to the measures' substantive validity; 2) should the City Council believe that a ballot measure is invalid, it must comply with its statutory duty to place the measure on the ballot, and it may then file an action in district court challenging the measure's validity; 3) the district court properly concluded that NRS 295.009's single-subject and description-of-effect requirements apply to all initiatives and referenda in Nevada; 4) the district court properly concluded that respondents' objections on these bases are not barred by NRS 295.061, which applies only to statewide measures; and 5) in applying NRS 295.009 to the measures at issue, the district court properly found that the proposed initiative pertains to more than one subject and that the description of effect for the proposed referendum is materially

misleading. The Court thus affirms the district court's order denying appellants' petitions to require that these measures be placed on the ballot.

Rivera v. Philip Morris, Inc., 125 Nev. Adv. Op. No. 18 (June 4, 2009) – The Court answers a certified question, pursuant to NRAP 5, regarding whether Nevada law recognizes a heeding presumption in strict product liability failure-to-warn cases, ruling that 1) a heeding presumption is a rebuttable presumption that allows a fact-finder to presume that the injured plaintiff would have heeded an adequate warning if one had been given; 2) a heeding presumption thus shifts the burden of proving the element of causation from the plaintiff to the manufacturer; 3) in Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries; 4) rather than demanding that the plaintiff prove that the inadequate warning caused his injuries, a heeding presumption requires the manufacturer to rebut the presumption that the plaintiff would have heeded an adequate warning by demonstrating that a different warning would not have changed the plaintiff's actions; and 5) because a heeding presumption shifts the burden of proving causation from the plaintiff to the manufacturer, it is contrary to Nevada law.

Ramet v. State, 125 Nev. Adv. Op. No. 19 (June 4, 2009) – The Court affirms a jury conviction of first-degree murder, ruling that 1) the State may not introduce evidence of or reference a defendant's invocation of his Fourth Amendment right to refuse to consent to a search of his home without a warrant; 2) the district court erred in allowing testimony and argument regarding appellant's invocation of his Fourth Amendment right; and 3) the error in this case was harmless beyond a reasonable doubt.

HD Supply Facilities Maint. v. Bymoen, 125 Nev. Adv. Op. No. 20 (June 11, 2009) – The Court answers three questions the United States District Court for the District of Nevada certified, under NRAP 5, concerning "[w]hether the Nevada rule stated in Traffic Control Servs. v. United Rentals, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004), that 'absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee [noncompetition] covenants are not assignable,' applies when a successor corporation acquires a non-competition covenant [, or a covenant of nonsolicitation or confidentiality] as a result of a merger?" The Court answers the three questions in the negative and clarifies that the rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.

St. James Village, Inc. v. Cunningham, 125 Nev. Adv. Op. No. 21 (June 25, 2009) – The Court affirms a district court order dismissing a complaint in an easement action, ruling that, in considering whether the servient estate owner has any authority to unilaterally relocate an easement burdening its property, provided that the relocation does not materially inconvenience the dominant estate owner, 1) the statement in Swenson v. Strout Realty, Inc., 85 Nev. 236, 239, 452 P.2d 972, 974 (1969), that "the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the

other's consent" is overbroad; 2) adoption of section 4.8 of the Restatement (Third) of Property, which permits a servient estate owner to unilaterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights, is warranted in those circumstances where the creating instrument does not define the easement through specific reference to its location or dimensions and the unilateral relocation will not materially inconvenience the dominant estate owner; and 3) because the creating instrument in this case specifies the location and dimension of the easement, the district court properly denied appellant's request for declaratory relief.

MGM Mirage v. Nevada Ins. Guaranty Ass'n, 125 Nev. Adv. Op. No. 22 (June 25, 2009) – The Court reverses a district court order granting summary judgment in a workers' compensation insurance coverage matter, ruling that 1) because the plain meaning of "insurer" necessarily denotes a person or entity that is in the insurance business, self-insured employers under Nevada's Workers' Compensation Act are not insurers under the Nevada Insurance Guaranty Association (NIGA) Act; and 2) appellants, as self-insured employers, may recover payment from NIGA for their workers' compensation claims that are "[c]overed claims" payable by their insolvent excess insurance carrier.

V & S Railway v. White Pine County, 125 Nev. Adv. Op. No. 23 (July 16, 2009) – The Court reverses a district court order granting summary judgment in an eminent domain action, ruling that 1) NRS 334.030, which facilitates the purchase of surplus governmental property by a governmental entity from another governmental entity, was not automatically triggered when the Los Angeles Department of Water and Power (LADWP), a governmental entity, designated a railroad as surplus property, thus precluding V & S Railway's ability to condemn the railroad pursuant to NRS 37.230; 2) NRS 334.030 is triggered when governmental entities take steps demonstrating their intent to enter into a contract for the purchase and sale of surplus governmental property; 3) on remand, the district court must determine whether the LADWP and the City of Ely had taken steps showing their intent to enter into a contract for the purchase and sale of the railroad, thus precluding V & S Railway's ability to pursue its condemnation action.

McConnell v. State, 125 Nev. Adv. Op. No. 24 (July 23, 2009) – The Court affirms an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus in a death penalty case, ruling that a constitutional challenge to Nevada's lethal injection protocol is not cognizable in a post-conviction petition for a writ of habeas corpus under NRS Chapter 34 because it does not implicate the validity of the death sentence itself.

Funderburk v. State, 125 Nev. Adv. Op. No. 25 (July 30, 2009) – The Court affirms a jury conviction of two counts of burglary while in possession of a deadly weapon, two counts of conspiracy to commit robbery, and four counts of robbery with use of a deadly weapon, ruling that 1) NRS 193.165(6)'s definitions are instructive for determining what constitutes a deadly weapon for enhancement purposes under NRS 205.060(4); and 2) the district court did not err by

instructing the jury on the definition of a "firearm," as defined in NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c).

Berry v. State, 125 Nev. Adv. Op. No. 26 (July 30, 2009) - The Court affirms in part and reverses in part a jury conviction of burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, and one count of open and gross lewdness, ruling that 1) the district court did not err by using NRS 202.265(5)(b)'s and NRS 202.253(2)'s definitions of "firearm" to instruct the jury on the meaning of "deadly weapon" since NRS 193.165(6)(c) specifically refers to weapons defined under NRS 202.265 as deadly weapons and, under NRS 193.165(6)(a), a "firearm" as defined under NRS 202.253(2) is also a "deadly weapon"; 2) Allen v. State, 96 Nev. 334, 609 P.2d 321 (1980), and Anderson v. State, 96 Nev. 633, 614 P.2d 540 (1980), are overruled to the extent that they suggest that a weapon that is likely to produce fear or a deadly reaction is a deadly weapon; rather, a weapon must meet one of the definitions set forth in NRS 193.165(6) to qualify as a deadly weapon for enhancement purposes; 3) regarding appellant's deadly weapon convictions, the State failed to present sufficient evidence to support a finding of a deadly weapon under NRS 193.165(6) since the State failed to demonstrate beyond a reasonable doubt that the weapon was designed to be capable of firing a metal projectile, as required under NRS 202.265(5)(b); and 4) NRS 201.210, the open and gross lewdness statute, is not unconstitutionally vague.

Commission on Ethics v. Hardy, 125 Nev. Adv. Op. No. 27 (July 30, 2009) – The Court affirms a district court order granting judicial review of a Nevada Ethics Commission decision and entering a permanent injunction in an ethics matter, ruling that 1) the power to discipline its membership with respect to the core legislative function of voting and, by extension, disclosure of conflicts of interest, is a function constitutionally committed to each house of the Legislature and it cannot be delegated to another branch of government; 2) because the Commission is part of the executive branch, any delegation to the Commission by the Legislature of the power to discipline its members with respect to such core legislative functions is an unconstitutional delegation of power in violation of the separation of powers provision of the Nevada Constitution; and 3) in light of the fundamental importance of the structural protections provided by the separation of powers doctrine, the Legislature cannot waive those protections by enacting a statute.

Allstate Insurance Co. v. Miller, 125 Nev. Adv. Op. No. 28 (July 30, 2009) - The Court affirms in part and reverses in part a district court judgment in an insurance bad-faith action in which Miller had sued Allstate as the insurer under three theories of bad-faith liability: breach of the covenant of good faith and fair dealing by failing to file an interpleader complaint, failing to adequately inform Miller of a settlement offer, and refusing to agree to a stipulated judgment in excess of Miller's policy limits. The jury returned a verdict in Miller's favor on the bad-faith claim; however, the district court denied Allstate's request to submit special interrogatories to the jury to determine upon which theory of bad faith the jury returned its verdict. The Court holds that 1) because a primary insurer's duty to

defend includes settlement duties and an insurer must give equal consideration to the insured's interest, the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers, including reasonable offers in excess of the policy limits; 2) Miller's two alternative theories of bad faith fail, since unless the policy says otherwise, an insurer does not have an independent duty to file an interpleader action on behalf of an insured, nor is an insurer required to agree to a proposed stipulated judgment between the insured and the claimant if that stipulated judgment is beyond the policy limits; 3) the district court abused its discretion in refusing without explanation to give the jury the special interrogatories that Allstate proposed: not giving special interrogatories in a case involving multiple claims or theories of liability compromises the ability to review the verdict for error on appeal; and 4) if a party submits special verdicts or interrogatories to the court pursuant to NRCP 49, the district court must approve or deny them on the record, and state its legal basis for doing so.

Chavez v. State, 125 Nev. Adv. Op. No. 29 (July 30, 2009) – The Court affirms a jury conviction of four counts of sexual assault on a child, ruling that 1) the preliminary hearing testimony of an unavailable witness may be admitted into evidence at trial without violating the Sixth Amendment Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004), since a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him; and 2) the adequacy of the opportunity will be determined on a case-by-case basis, determined by such considerations as to how much discovery was available to the defendant at the time of the cross-examination and the manner in which the magistrate judge allows the cross-examination to proceed.

Grosjean v. Imperial Palace, 125 Nev. Adv. Op. No. 30 (July 30, 2009) – The Court affirms in part and reverses in part a district court judgment on a jury verdict, certified as final under NRCP 54(b), in a bifurcated civil rights/tort action, ruling that 1) qualified immunity cannot extend to shield private actors from civil liability in a 42 U.S.C. § 1983 action; 2) respondents are not entitled to a new trial based on certain evidentiary rulings because there was no abuse of discretion; 3) with regard to the liability and compensatory damages phase of the trial, any attorney misconduct was properly addressed by the district court when objected to, and any unobjected-to comments did not rise to the irreparable and fundamental error level warranting a new trial as to liability and compensatory damages (affirming the judgment as to compensatory damages); and 4) since the nature and extent of appellant's attorney's misconduct during the punitive damages phase of the trial was egregious and could not have been cured by a sustained objection, and the jury's verdict appeared controlled by the misconduct rather than the evidence, a new trial is warranted as to punitive damages.

Clark County Sch. Dist. v. Virtual Educ., 125 Nev. Adv. Op. No. 31 (August 6, 2009) – The Court reverses a district court judgment on a jury verdict in a business defamation action, ruling that 1) the absolute privilege affords parties to litigation the same protection from liability that exists for an attorney for defamatory statements made during, or in anticipation of, judicial proceedings;

and 2) when allegedly defamatory statements concern a business's product and the plaintiff seeks to redress injury to economic interest, the claim is one for business disparagement, not defamation per se.

Zamora v. Price, 125 Nev. Adv. Op. No. 32 (August 6, 2009) – The Court affirms a district court judgment entered on a jury verdict in a tort action conducted under the short trial program, ruling that NRS 38.259(2), which requires that, when a party requests a new trial at the conclusion of mandatory nonbinding arbitration proceedings in a short trial matter, the arbitrator's findings must be admitted during the new trial, does not violate a party's constitutional right to a jury trial or a party's right to equal protection under the law.

Boulder Oaks Cmty. Ass'n v. B & J Andrews, 125 Nev. Adv. Op. No. 33 (August 20, 2009) – The Court grants a rehearing in an appeal from a district court order granting a preliminary injunction in a real property action, ruling that 1) the appellant Association is a common-interest community governed by NRS Chapter 116; 2) CC&R section 9.04(a) violates NRS 116.2107(4) by creating an improper voting class in the respondent, making this part of section 9.04 void; 3) the Association was not required to obtain respondent's consent before amending the CC&Rs; 4) the Association received the requisite number of votes to amend the CC&Rs; and 5) respondent does not have a reasonable likelihood of success on the merits in the case below (reversing the district court's grant of the preliminary injunction against appellant Association).

Rivero v. Rivero, 125 Nev. Adv. Op. No. 34 (August 27, 2009) – The Court denies a rehearing but issues a new opinion in an appeal from a district court post-divorce decree order modifying a joint child custody award, ruling 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; 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; 3) the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification; and 4) the district court abused its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero's motion to disqualify the district court judge.

D.R. Horton v. Dist. Ct., 125 Nev. Adv. Op. No. 35 (September 3, 2009) – The Court denies a writ petition challenging a district court order denying partial summary judgment in a constructional defect matter, ruling that under NRS 116.3102(1)(d), a homeowners' association has standing to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community. However, because such actions are filed by a homeowners' association in a representative capacity for individual units, the claims must be analyzed according to class action principles set forth in NRCP 23 and Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005).

Dobron v. Bunch, 125 Nev. Adv. Op. No. 36 (September 10, 2009) – The Court reverses a district court judgment awarding attorney fees as damages in a contract action, ruling that, on the issue of whether a guarantor to a loan may be held liable for attorney fees incurred by the lender in defending a usury action brought by the borrowers, while a guarantor's obligation to a lender under a guaranty agreement should be strictly construed and will not require a guarantor to be responsible for obligations beyond those specified in the guaranty agreement, and the Court has recognized a distinction between a surety who is compensated and one who is not and eliminated the strict construction rule in favor of the surety when the surety is compensated, such a distinction is no longer necessary. Consequently, when interpreting a guaranty agreement, whether a guarantor is compensated is not relevant, and rather than apply a strict rule of construction, the Court will apply general contract construction rules.

Bower v. Harrah's Laughlin, 125 Nev. Adv. Op. No. 37 (September 10, 2009) – On consolidated appeals from a district court summary judgment in consolidated tort actions and from post-judgment orders awarding attorney fees and costs, the Court affirms in part and reverses in part,. The case arises out of a brawl between the Hell's Angels and the Mongols at Harrah's Laughlin at the River Run event in 2002. Several groups of plaintiffs, who were not directly involved in the brawl, sued Harrah's under various negligence theories in California state court, Nevada state court, and Nevada federal court.

- First, the Court addresses the district court's rehearing of Harrah's summary judgment motion regarding plaintiff Bower and concludes that the district court properly reheard the motion pursuant to NRCP 54(b), and Bower consented to the rehearing, thereby failing to preserve the issue for appeal.
- Second, the Court discusses federal and state issue preclusion and highlights the difference between the adequate representation exception to federal issue preclusion and the privity requirement of Nevada issue preclusion, analyzing federal issue preclusion under Taylor v. Sturgell, 553 U.S. ___, 128 S. Ct. 2161 (2008), which changed federal issue preclusion law after the district court rendered its decision in this case.
- Third, the Court reviews the district court's decision granting Harrah's summary judgment, which determined that issue preclusion barred appellants' claims based on prior federal decisions. Applying federal issue preclusion law, the Court concludes that the district court inappropriately granted Harrah's summary judgment based on issue preclusion because the plaintiffs in the prior federal cases did not adequately represent appellants' interests.
- Fourth, the Court reviews the district court's decision granting Harrah's summary judgment, which determined that issue preclusion barred appellants' claims based on prior state decisions. Applying Nevada issue preclusion law, the Court concludes that the district court inappropriately

granted Harrah's summary judgment based on issue preclusion because the plaintiffs in the prior state cases were not in privity with appellants.

- Fifth, the Court addresses the district court's decision granting Harrah's summary judgment regarding plaintiffs Garcia and Lewis based on the merits of their case, concluding that the district court properly granted Harrah's summary judgment because the Las Vegas Metropolitan Police Department (Metro) was a superseding intervening cause of Garcia's and Lewis' harm, and therefore, Harrah's is not liable.
- Finally, the Court addresses the district court's awarding Harrah's attorney fees for defending against appellants' meritless claims and its awarding Harrah's costs as the prevailing party, holding that the district court erred in granting Harrah's attorney fees because appellants did not unreasonably maintain their claims. Because Harrah's only prevailed against Garcia and Lewis, the Court vacates the costs award against all appellants except Garcia and Lewis.

Sonia F. v. Dist. Ct., 125 Nev. Adv. Op. No. 38 (September 10, 2009) – The Court grants in part a writ petition challenging a district court order affirming a discovery commissioner's report and recommendations, ruling that 1) Nevada's rape shield law, codified under NRS 50.090, is plain and unambiguous, and applies only to criminal proceedings and not civil cases; however, the district court may limit the discovery of an alleged victim's sexual history under NRCP 26, if necessary to protect the victim's interests.

Flamingo Paradise Gaming v. Att'y General, 125 Nev. Adv. Op. No. 39 (September 24, 2009) – The Court affirms a district court judgment concerning the constitutionality of the Nevada Clean Indoor Air Act ("NCIAA"), ruling that 1) the NCIAA provides sufficient definiteness to avoid a facial challenge under the lower level test of whether the statute is vague in all its applications but does not survive the higher test of whether vagueness permeates its text; 2) the statute is not unconstitutionally vague for civil enforcement, but it is unconstitutionally vague for criminal enforcement, and the district court properly severed the criminal enforcement provisions from the Act; 3) the NCIAA does not violate equal protection, as there are rational bases for the classifications made within the statute; and 4) the NCIAA does not constitute a governmental taking of private property.

Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. Adv. Op. No. 40 (September 24, 2009) – The Court reverses a district court order adjudicating an attorney-client fee dispute and the entry of judgment awarding attorney fees in a personal injury action, ruling that 1) absent an enforceable charging lien or the client's request or consent to the district court's adjudication of a retaining lien, the district court is without jurisdiction to adjudicate an attorney-client fee dispute in the underlying action; 2) when the client asserts legal malpractice as a defense against the attorney's claim for fees, it is particularly inappropriate to summarily adjudicate the fee dispute in the underlying action; and 3) when the district court lacks jurisdiction to adjudicate the fee dispute or the client objects to the court's

adjudication of the dispute based on its legal malpractice claim against the attorney, the attorney seeking to recover fees should file a separate action to do so.

Zana v. State, 125 Nev. Adv. Op. No. 41 (September 24, 2009) – The Court affirms a jury conviction of one count of open or gross lewdness, three counts of lewdness with a child under the age of 14, and six counts of possession of visual representation depicting sexual conduct of a person under the age of 16, ruling that 1) with regard to the admissibility of testimony regarding prior bad acts when the resulting court proceedings were sealed or expunged, the district court may permit testimony that is confined to a witness's personal experiences so long as the witness does not rely on the previously sealed or expunged court proceedings and does not indicate that such proceedings took place; 2) any jury misconduct that occurred in this case did not prejudice the verdict, and thus, a new trial was not warranted; and 3) the district court did not abuse its discretion by denying the motion to sever the lewdness counts from the pornography counts because the evidence presented in each case was admissible in the other case.

In re Estate of Miller, 125 Nev. Adv. Op. No. 42 (September 24, 2009) – The Court reverses a district court order denying a motion for attorney fees but awarding costs, ruling on an appeal presenting three narrow but previously undecided issues concerning offer of judgment practice under NRCP 68 and NRS 17.115 that 1) a judgment obtained on or after appeal can qualify as a "more favorable judgment" for purposes of the fee-shifting provisions of NRCP 68 and NRS 17.115; 2) appellate fees are recoverable; and 3) an unrepresented party who serves an offer of judgment may recover fees later paid to a lawyer hired to prosecute or defend the case.

Ozawa v. Vision Airlines, 125 Nev. Adv. Op. No. 43 (October 1, 2009) – On consolidated appeals from a district court summary judgment in an employment action and from a post-judgment order denying in part and granting in part a motion for attorney fees and costs, the Court affirms in part and reverses in part, 1) declining to recognize a new exception to the at-will employment doctrine and allow a claim for tortious discharge related to an employee's termination for attempting to organize his fellow employees, since the appellant had an available statutory remedy (affirming the district court's order granting summary judgment on this claim); 2) affirming the district court's denial of respondents' motion for attorney fees and concluding that the district court properly weighed the relevant factors; and 3) reversing in part the district court's costs award that attempts to provide compensation for a previously dismissed cause of action (remanding this matter to the district court with instructions to amend respondents' award of costs).

Delgado v. American Family Ins. Group, 125 Nev. Adv. Op. No. 44 (October 1, 2009) – The Court reverses a district court order granting summary judgment in a contract action, ruling that 1) a passenger who is injured by two concurrently negligent drivers may recover from both the permissive driver's single insurance policy liability benefits based on the permissive driver's negligence and

underinsured motorist benefits based on the other driver's underinsured status; and 2) the antistacking rule set forth in Peterson v. Colonial Insurance Co. [100 Nev. 474, 686 P.2d 239 (1984)] and Baker v. Criterion Insurance [107 Nev. 25, 805 P.2d 599 (1991)] is not implicated when a passenger, whose injuries are attributable to two jointly negligent drivers, exhausts the liability limits of the permissive driver's policy without satisfying his or her damages, and seeks recovery under the permissive driver's underinsured motorist policy based on the other driver's underinsured status.

Rodriguez v. Primadonna Company, 125 Nev. Adv. Op. No. 45 (October 1, 2009) – The Court affirms a district court's grant of summary judgment in a tort action, ruling that 1) in accordance with the common law rule that a proprietor's sale of alcohol is not the proximate cause of an intoxicated plaintiff's injuries that are sustained after a rightful and reasonable eviction, a proprietor does not, as a matter of law, have an affirmative duty to prevent injury to an intoxicated patron subsequent to an eviction; 2) plaintiff's claim was not frivolous (affirming the district court's decision denying defendant's motion to recover attorney fees and costs); and 3) implied indemnity is not applicable to the case.

Wyman v. State, 125 Nev. Adv. Op. No. 46 (October 8, 2009) – The Court reverses a jury conviction of second-degree murder, ruling that 1) the Court will review a district court's denial of a motion to dismiss based on pre-indictment delay for an abuse of discretion; 2) the district court did not abuse its discretion by refusing to dismiss the complaint because Wyman failed to demonstrate that she was prejudiced by the delay and that the State intentionally delayed filing the complaint to gain a tactical advantage over Wyman; 3) Nevada's Uniform Act applies to subpoenas duces tecum for material books and records that include an ancillary request for the appearance of an out-of-state witness; 4) the term "material," as used in NRS 174.425(1) (which authorizes a criminal defendant in one jurisdiction to subpoena a "material witness" from another jurisdiction to testify in a criminal matter), refers to evidence that has some logical connection with the facts of consequence or the issues presented in the case; 5) the district court abused its discretion by denying Wyman's request for a certificate of materiality to obtain the State's primary witness's out-of-state mental health records; and 6) Wyman's judgment of conviction is reversed because this error was not harmless.

Webb v. Clark County School Dist., 125 Nev. Adv. Op. No. 47 (October 8, 2009) – The Court affirms in part and reverses in part an from a short trial judgment in a tort action, ruling that 1) the Paul D. Coverdell Teacher Protection Act of 2001 is an affirmative defense that must be pleaded or it is waived; 2) respondents failed to plead the Coverdell Act (affirming the district court's judgment with respect to liability); and 3) as a matter of law, damages for psychological services rendered in Nevada by a person who is not properly licensed in this state are not recoverable (reversing the district court's damages award for the psychological services rendered).

Citizens for Cold Springs v. City of Reno, 125 Nev. Adv. Op. No. 48 (October 15, 2009) – The Court reverses a district court order dismissing a complaint for

declaratory and injunctive relief in an annexation dispute, ruling that 1) NRS 268.668 confers the right to seek judicial review to "any person" claiming to be adversely affected by an annexation; 2) NRS 268.668 requires that a claim of adverse effect be adequately pleaded for a citizen to have standing to challenge a land annexation; 3) NRS 268.668 contemplates both current and reasonably ascertainable future adverse effects; and 4) citizens may challenge an annexation even if the annexation does not include their property (expanding Hantges v. City of Henderson, 121 Nev. 319, 113 P.3d 848 (2005).

Mendoza-Lobos v. State, 125 Nev. Adv. Op. No. 49 (October 29, 2009) – The Court affirms a jury conviction of one count each of burglary, robbery with the use of a deadly weapon, sexual assault with the use of a deadly weapon, attempted sexual assault with the use of a deadly weapon, assault with a deadly weapon, and battery with a deadly weapon, addressing two issues related to recent amendments to the deadly weapon enhancement statute and ruling that 1) the portion of NRS 193.165(1) requiring district courts to state on the record that they have considered the factors enumerated in that statute violates the separation-of-powers doctrine; 2) nevertheless, district courts should comply with NRS 193.165(1) in its entirety because it serves a laudable legislative goal with respect to the length of enhancement sentences and facilitates appellate review; 3) compliance with NRS 193.165(1) requires district courts to articulate findings on the record, for each enumerated factor, when imposing a sentence for a deadly weapon enhancement; 4) if a district court is imposing a weapon enhancement on multiple counts, separate findings must be made for each enhancement; and 5) the district court's failure to make the required findings for two of appellant's enhancements does not amount to plain error warranting reversal of his conviction and sentence.

NC-DSH, Inc. v. Garner, 125 Nev. Adv. Op. No. 50 (October 29, 2009) – The Court affirms a district court order vacating a stipulated final judgment under NRCP 60(b) for fraud on the court, ruling that 1) the district court found that the attorney in question committed "fraud upon the court," which is not subject to NRCP 60(b)(3)'s six-month limitations period; 2) although true fraud on the court is rare and requires "egregious misconduct," the district court did not abuse its discretion in finding such fraud by here, nor were its findings clearly erroneous; and 3) appellants did not establish prejudicial delay from the timing of respondents' motion under NRCP 60(b).

Ogawa v. Ogawa, 125 Nev. Adv. Op. No. 51 (November 12, 2009) – The Court reverses a district court amended default divorce decree determining custody of the parties' three minor children and dividing community property in an international child custody dispute and divorce action between appellant, who resides in Japan with the parties' three children, and respondent, who lives in Henderson, ruling that 1) the district court properly determined that it had jurisdiction to make custody decisions because Nevada is the children's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at NRS Chapter 125A; 2) the district court properly entered an order directing the children's return to the United States; and 3) because

appellant made an appearance and answered the complaint, evidencing his intent to defend against the action, a default decree was inappropriate.

Lueck v. Teuton, 125 Nev. Adv. Op. No. 52 (November 12, 2009) – In proceedings regarding the commission of the Honorable Robert W. Teuton, Judge, Eighth Judicial District Court, Family Court Division, the Court rules that 1) in the absence of the attorney general's participation and leave of court, NRS Chapter 35 does not authorize an individual with only a general interest in the outcome to pursue quo warranto proceedings on behalf of the state to remove a person from public office; 2) under Nevada Constitution Article 6, Section 20(2), an individual appointed to fill a vacancy in a district court judge office serves until "the first Monday of January following the next general election" which means the general election that most immediately follows the appointment; and 3) under Section 20(2), Judge Teuton's appointment expired on January 5, 2009—the first Monday of January after the 2008 general election and the clerk of the Court is directed to issue a writ of mandamus to Governor Jim Gibbons directing him to declare Judge Robert W. Teuton's office vacant under NRS 3.080(1).

Glover v. Dist. Ct., 125 Nev. Adv. Op. No. 53 (November 12, 2009) – The Court denies a writ petition to bar retrial on double jeopardy grounds, ruling that 1) the defense violated the district judge's orders excluding evidence and crossed the line that separates legitimate negative inference argument from impermissible statements about facts not in evidence and personal opinion; 2) the resulting potential for juror bias created a "manifest necessity" for mistrial; and 3) double jeopardy does not bar retrial in such a case (citing Arizona v. Washington, 434 U.S. 497, 514 (1978)).

Fierle v. Perez, 125 Nev. Adv. Op. No. 54 (November 19, 2009) – The Court affirms in part and reverses in part a district court order dismissing a medical tort action and denying a post-judgment motion for NRCP 60(b) relief, ruling that 1) an expert affidavit is required for medical malpractice actions against professional medical corporations and professional negligence actions against nurses and nurse practitioners under NRS 41A.071, and therefore, the district court did not err in dismissing the complaint with regard to such claims; 2) the district court erred in dismissing the negligent extravasation claim against one member of the staff because that claim falls under the res ipsa loquitur statutory exception to NRS 41A.071 and, therefore, is not required to be supported by an expert medical affidavit; and 3) an amended complaint cannot cure a complaint that becomes void ab initio for the failure of a party to attach the required medical expert affidavit under NRS 41A.071.

John v. Douglas County School District, 125 Nev. Adv. Op. No. 55 (November 25, 2009) – The Court affirms a district court order granting a special motion to dismiss, under NRS 41.660, Nevada's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, in an employment matter, ruling that 1) Nevada's anti-SLAPP statute does apply to appellant's federal causes of action (for religious discrimination, First Amendment violations, and civil rights violations) because it is a neutral and procedural statute that does not undermine any federal interests; and 2) the district court properly dismissed appellant's

lawsuit for two reasons: the school district made a threshold showing that the communications by school employees and the DCSD regarding appellant's inappropriate behavior at work and the resulting investigations were protected under the anti-SLAPP statute, and this showing shifted the burden of production to appellant, and appellant failed to allege a genuine issue of material fact regarding the claims he filed based on the communications by school employees and the DCSD about the investigations into his conduct at work.

Ouanbengboune v. State, 125 Nev. Adv. Op. No. 56 (December 3, 2009) – 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, adopting procedures to resolve claims of interpreter errors discovered post-judgment and to determine both whether inaccuracies fundamentally altered the context of the trial testimony and whether the inaccuracies prejudiced the defendant such that a new trial is warranted (citing Baltazar-Monterrosa v. State, 122 Nev. 606, 616-17, 137 P.3d 1137, 1144 (2006)), and further ruling that 1) while although certain inaccuracies did fundamentally alter the context of appellant's testimony, there was overwhelming evidence of guilt for the jury to convict and these inaccuracies did not prejudice appellant such that a new trial is warranted; and 2) the failure to instruct the jury on afterthought robbery did not amount to plain error, since based on the overwhelming evidence of a premeditated, willful, and deliberate killing, a rational jury would have convicted appellant of first-degree murder despite not being properly instructed on afterthought robbery for purposes of felony murder.

Fields v. State, 125 Nev. Adv. Op. No. 57 (December 10, 2009) – The Court reverses a jury conviction of first-degree murder, ruling that the district court abused its discretion in admitting evidence of a prior bad act in the form of a prior uncharged conspiracy because the prior conspiracy was not similar enough to the crimes charged to be relevant as proof of a common plan or scheme, and the probative value of the bad act evidence was substantially outweighed by the danger of unfair prejudice.

Fields v. State, 125 Nev. Adv. Op. No. 58 (December 10, 2009) – The Court affirms a jury conviction of one count each of first-degree murder with the use of a deadly weapon and conspiracy to commit murder, ruing that the district court did not abuse its discretion in making the evidentiary rulings it did with regard to the admission of certain prior bad act evidence and the exclusion of testimony from two defense witnesses, nor did the district court commit instructional error.

Thompson v. State, 125 Nev. Adv. Op. No. 59 (December 10, 2009) – The Court affirms a jury conviction of conspiracy to commit a crime, burglary, robbery, first-degree kidnapping, and attempted grand larceny auto, ruling that NRS 178.562(1) did not bar the State from electing between two pending vehicles for prosecution of the same offenses by choosing to prosecute appellant on the grand jury indictment after it voluntarily dismissed the criminal complaint. As held in Turpin v. Sheriff, 87 Nev. 236, 238, 484 P.2d 1083, 1085 (1971), a defendant is not prejudiced by the State choosing to pursue one of two pending proceedings for the same offense.

Sanchez v. Wal-Mart Stores, 125 Nev. Adv. Op. No. 60 (December 24, 2009) – The Court affirms a district court order, certified as final under NRCP 54(b), dismissing appellants' complaint against respondents in a wrongful death and personal injury action which arose after a pharmacy customer, while driving under the influence of prescription drugs, allegedly caused an automobile accident resulting in one person's death and severe injuries to another, ruling that 1) pharmacies do not owe a duty of care to unidentifiable third parties; and 2) Nevada's pharmacy statutes and regulations concerning prescription drug dispensation and customer recordkeeping maintenance are not intended to protect the general public from the type of injury sustained in this case, and thus, do not support the appellants' negligence per se claim

Landreth v. Malik, 125 Nev. Adv. Op. No. 61 (December 24, 2009) – The Court vacates a district court default judgment, ruling that the case concerned real and personal property acquired during a meretricious relationship, a matter not enumerated in NRS 3.223, and, no other basis for the family court to have exercised original jurisdiction appearing, the family court lacked subject matter jurisdiction to enter judgment.

In re Parental Rights as to N.J., 125 Nev. Adv. Op. No. 62 (December 24, 2009) – The Court affirms a district court order terminating appellant's parental rights as to a minor child, resolving questions concerning the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63 (2006), and ruling that 1) a dual-standard burden of proof is appropriate for evidentiary findings in parental termination cases involving the ICWA; 2) therefore, the higher beyond-a-reasonable-doubt evidentiary standards of the ICWA will be used for ICWA-related findings, and Nevada's clear-and-convincing evidence standard will apply to state law findings; 3) when a non-Native American parent is challenging the termination of parental rights, the breakup of a Native American family is not at issue, and neither the tribe nor the Native American parent is contesting the termination, application of the Existing Indian Family (EIF) doctrine, a judicially created exception to the ICWA, may be appropriate; 4) in the present case, substantial evidence supports the district court's determination that termination of parental rights was in the child's best interest and that parental fault existed; and 5) the district court correctly applied the EIF doctrine in this case.

Stephens Media v. Dist. Ct., 125 Nev. Adv. Op. No. 63 (December 24, 2009) – The Court grants a writ petition challenging a district court order denying a motion to intervene and modify the court's decorum order regarding juror questionnaires, ruling as follows. First, petitioners' motion to intervene in a criminal case to seek access to juror questionnaires is procedurally proper; since limited intervention by the public or the press is an appropriate procedural mechanism by which the public or press may assert its First Amendment interests in a criminal case, and the district court therefore committed error in denying petitioners' motion to intervene. Second, juror questionnaires used in jury selection are subject to public disclosure, since juror questionnaires are, like the jury-selection process itself, presumptively subject to public disclosure, and the presumption of openness may be overcome only if the district court identifies

a countervailing interest to public access and demonstrates, by specific findings, that closure is necessary and narrowly tailored to serve a higher interest. Third, because the district court neither articulated specific findings to show that concerns about juror candor superseded the First Amendment's presumption of open proceedings in jury selection nor considered reasonable alternatives to a complete closure of the questionnaires, the petition is granted and the district court is directed to release all blank and completed juror questionnaires to petitioners. Finally, because the underlying criminal trial concluded and the jury rendered a verdict, this remedy might be considered moot; nonetheless, the petition was considered because the primary issue—whether juror questionnaires used in jury selection are subject to public disclosure—is of a type that is capable of repetition but evading review.