

2010 Nevada Supreme Court Opinion Digest

Higgs v. State, 126 Nev. Adv. Op. No. 1 (January 14, 2010) – The Court affirms a jury conviction of first-degree murder, ruling that 1) the standard for the admissibility of expert testimony in Nevada, as it is articulated by NRS 50.275, is reaffirmed (declining to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); 2) *Hallmark v. Eldridge*, 124 Nev. ____, 189 P.3d 646 (2008), did not adopt the standard set forth in *Daubert* inferentially; and 3) appellants' challenge to the testimony of the State's scientific expert fails, as do all the other arguments raised on appeal.

Great Basin Water Network v. State Eng'r, 126 Nev. Adv. Op. No. 2 (January 28, 2010) – The Court reverses a district court order denying a petition for judicial review in a water rights action, ruling that 1) the State Engineer violated his statutory duty under NRS 533.370(2) by failing to rule on Southern Nevada Water Authority's (SNWA) 1989 water appropriation applications within one year; 2) NRS 533.370(2), as it existed in 1989, required the State Engineer to approve or reject each water appropriation application within one year after the final protest date; 3) while the State Engineer could postpone taking action beyond one year if he obtained written authorization from the applicant and protestants or if there was an ongoing water supply study or court action, none of those conditions occurred by the end of 1991; 4) although in 2003 the Legislature amended NRS 533.370 to permit the State Engineer to postpone action on pending applications made for a municipal use, "pending" applications are those that were filed within one year prior to the enactment of the 2003 amendment; and 5) in the absence of statutory language and legislative history demonstrating an intent that the amendment apply retroactively to SNWA's 1989 applications, the State Engineer could not take action on them under the 2003 amendment to NRS 533.370.

Fernandez v. Fernandez, 126 Nev. Adv. Op. No. 3 (February 4, 2010) – The Court reverses a district court post-decree order denying appellant's motion to modify child support, ruling that the trial court's conclusion that it was "not bound" by NRS 125B.145 because the parties "previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support" was error, since the father's motion presented facts that, if true, qualified for relief and NRS Chapter 125B "does not admit a child support order that cannot be modified based on a material change in circumstances."

Dictor v. Creative Management Services, 126 Nev. Adv. Op. No. 4 (February 4, 2010) – The Court affirms a district court order granting summary judgment in an insurance action, ruling that 1) when an appellate court explicitly or by necessary implication determines an issue, the law-of-the-case doctrine provides that the determination governs the same issue in subsequent proceedings in the same case; 2) because the Court’s unpublished order in a previous appeal involving these same parties and stemming from the same lower court case narrowly addressed a single issue, the district court did not violate the law-of-the-case doctrine; and the district court was not precluded from applying the Missouri Property and Casualty Insurance Guaranty Association Act, Missouri Revised Statute section 375.772 (Mo. Rev. Stat. § 375.772), and other alternate legal defenses on remand; 3) regarding the proper choice-of-law analysis for defenses to the subrogation of underlying tort claims, although the district court’s choice-of-law analysis was procedurally flawed because it did not rely upon a “more specific section” of the Restatement (Second) of Conflict of Laws prior to conducting a section 6 analysis, the district court’s determination that Missouri law applied was correct, and the district court’s judgment will not be disturbed even though it was reached by relying on different grounds [affirming the district court’s choice-of-law conclusion that the Missouri statute barring tort claims against an insured of an insolvent insurer precludes appellant CPCI’s subrogation claims].

Foster v. Dingwall, 126 Nev. Adv. Op. No. 5 (February 25, 2010) – The Court denies a motion for remand following the district court’s certification of its inclination to grant appellants’ NRCP 60(b)(2) motion for relief from the underlying judgment based on newly discovered evidence, 1) clarifying the process, announced in Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978), for seeking a remand to the district court to alter, vacate, or otherwise modify or change a district court order or judgment after an appeal to this court from that order or judgment has been perfected; and 2) ruling that perfection of an appeal does not toll NRCP 60(b)(2)’s six-month time period for seeking relief, and holding that appellants’ request for NRCP 60(b)(2) relief was untimely.

Foster v. Dingwall, 126 Nev. Adv. Op. No. 6 (February 25, 2010) – The Court affirms in part and reverses in part a district court judgment in a contracts action, ruling that 1) because appellants’ conduct during discovery was repetitive, abusive, and recalcitrant, the district court’s decision to strike appellants’ pleadings and enter default was a proper discovery sanction; 2) after an entry of default, at an NRCP 55(b)(2) prove-up hearing, the nonoffending party retains the burden of presenting sufficient evidence to establish a prima facie case for each cause of action as well as demonstrating by substantial evidence that damages are attributable to each claim; 3) the award of compensatory damages to respondent Terry Dingwall is upheld because Dingwall presented a prima facie case for damages on each cause of action, which included substantially demonstrating that he was entitled to the relief sought; and 4) the compensatory damage award to respondents Hyun Ik Yang and Hyunsuk Chai is reversed

because it was duplicative and because no evidence was presented to show the relationship between the tortious conduct and the requested award.

NAIW v. Nevada Self-Insurers Association, 126 Nev. Adv. Op. No. 7 (February 25, 2010) – The Court reverses a district court order granting declaratory and injunctive relief in an action regarding the amendment of administrative regulations, ruling that 1) activities of daily living should be taken into consideration when evaluating work-related spinal injuries; and 2) thus, NAC 616C.476 does not violate NRS 616C.110(2)(c) or NRS 616C.490(5).

Schwartz v. Schwartz, 126 Nev. Adv. Op. No. 8 (March 4, 2010) – The Court affirms in part and reverses in part a district court divorce decree and post-decree orders denying a motion for a new trial and addressing property issues, ruling that the district court abused its discretion in failing to conduct a full and proper analysis of whether lump-sum alimony was appropriate in this case; a district court should assess not only age disparity as set forth in *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), but should also assess whether the life expectancy of the payor makes the award illusory.

Saylor v. Arcotta, 126 Nev. Adv. Op. No. 9 (March 4, 2010) – The Court reverses a district court summary judgment, certified as final under NRCP 54(b), on a third-party complaint for indemnity and contribution in a tort action and 1) ruling that claims for equitable indemnity are subject to the limitations period prescribed by NRS 11.190(2)(c), while claims for contribution are subject to the limitations period prescribed by NRS 17.285; and 2) reversing because no judgment has been entered in the case at hand, and thus the applicable statutes of limitations have not yet begun to run.

Coast to Coast Demo. v. Real Equity Pursuit, 126 Nev. Adv. Op. No. 10 (March 4, 2010) – The Court affirms a confession of judgment entered in district court, ruling that the judgment substantially complied with the statutory requirements of NRS 17.090-110 and that, without more, a debtor cannot avoid an otherwise valid signed confession based on his failure to verify the statements he subscribed.

Cromer v. Wilson, 126 Nev. Adv. Op. No. 11 (March 11, 2010) – The Court affirms a district court judgment on a jury verdict in favor of appellants in a torts action and a post-judgment order denying attorney fees and prejudgment interest, ruling that 1) the conclusive presumption of NRS 41.133 [allowing a judgment of conviction to conclusively establish civil liability for a crime] applies to liability but does not abrogate the law regarding comparative negligence or damages; 2) the district court should have granted the summary judgment motion as to liability and held a trial as to damages only; at such a trial, the defense could have introduced evidence of comparative fault, if any, to reduce the damages award; 3) in this case, the district court allowed the trial to proceed as to liability and damages; 4) although the district court utilized the incorrect

procedure, the appropriate outcome was reached and the judgment should be affirmed.

Posas v. Horton, 126 Nev. Adv. Op. No. 12 (April 15, 2010) – The Court reverses a district court judgment on a jury verdict in a tort action and post-judgment orders awarding costs and denying a motion for a new trial and an NRCP 60(b) motion, ruling that the district court erred in giving a sudden-emergency jury instruction in a rear-end automobile collision case and clarifying that the sudden-emergency doctrine applies when an emergency affects the actor requesting the instruction and the actor shows that he or she was otherwise exercising due care.

Easton Bus. Opp. v. Town Executive Suites, 126 Nev. Adv. Op. No. 13 (May 6, 2010) – The Court reverses a district court judgment in an action to recover a real estate broker's commission claimed under an exclusive right-to-sell brokerage agreement for the sale of a business, and from a post-judgment order awarding attorney fees and costs, ruling that the district court ruling in favor of the seller and against the broker's assignee was contrary to the express terms of the agreement.

State, DMV v. Taylor-Caldwell, 126 Nev. Adv. Op. No. 14 (May 6, 2010) – The Court reverses a district court order granting a petition for judicial review in a DUI driver's license revocation action, confirming that a single test to determine the concentration of alcohol in a person's breath will require revocation of a driver's license; while NRS 484.386(1) requires that two consecutive samples of breath be taken to provide an evidentiary basis for the concentration of alcohol in a person's breath, NRS 484.384 does not require that the two consecutive samples be over the legal limit to mandate revocation; only one valid sample must be over the legal limit in order for the Department of Motor Vehicles (DMV) to revoke a driver's license.

In re Sandoval, 126 Nev. Adv. Op. No. 15 (May 13, 2010) – The Court answers a certified question, pursuant to NRAP 5, concerning whether a default judgment entered for failure to file an answer has issue-preclusive effect in a bankruptcy proceeding, ruling that because Nevada law requires an issue to have been actually and necessarily litigated for issue preclusion to apply, a default judgment entered in these circumstances does not carry such effect.

Thomas v. Hardwick, 126 Nev. Adv. Op. No. 16 (May 27, 2010) – The Court affirms a district court judgment on a jury verdict in a wrongful death action, ruling that there was no abuse of discretion in 1) the conduct of voir dire about tort reform; 2) the admission of evidence on a medical practitioner's routine practice under NRS 48.059; 3) the refusal to impose preclusive or other significant sanctions for negligence in having lost an original medical chart when copies were available; and 4) allowing general testimony about recall bias to impeach a witness in the absence of a specific objection from counsel.

Betsinger v. D.R. Horton, Inc., 126 Nev. Adv. Op. No. 17 (May 27, 2010) – The Court affirms in part and reverses in part a district court final judgment in an action based on fraud and deceptive trade practices, ruling that 1) any cause of action for deceptive trade practices under NRS Chapter 598 must be proven by a preponderance of the evidence; 2) a substantial portion of Betsinger's compensatory damage award must be reversed because he failed to present evidence of any physical manifestation of emotional distress; 3) the punitive damages award against Daniel Callahan must be reversed because Betsinger failed to recover any general damages against Callahan aside from damages for emotional distress; and 4) the case must be remanded for a new trial on punitive damages against DHI Mortgage Company, Ltd., because the Court is unable to adequately review the jury's punitive damages award in light of the decision to substantially reduce the compensatory damages award.

Marvin v. Fitch, 126 Nev. Adv. Op. No. 18 (May 27, 2010) – The Court affirms a district court order of dismissal, certified as final under NRCP 54(b), in a 42 U.S.C. § 1983 action, ruling that the State Board of Equalization is performing a quasi-judicial function when determining whether to equalize property valuations, and its members therefore have absolute immunity from suit.

Polk v. State, 126 Nev. Adv. Op. No. 19 (June 3, 2010) – The Court reverses a jury conviction of second-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle, ruling that 1) the State failed to directly address appellant's arguments that his constitutional right to confrontation under the Sixth Amendment of the United States Constitution and Crawford v. Washington, 541 U.S. 36 (2004), and Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009), was violated when the findings of a gunshot residue analyst who did not testify at trial and was not subject to cross-examination were admitted; 2) the State failed to argue, alternatively, that any potential constitutional violation was harmless error; and 3) because the State failed to respond to Polk's alleged constitutional violation, it effectively confessed error under NRAP 31(d).

Great Basin Water Network v. State Eng'r, 126 Nev. Adv. Op. No. 20 (June 17, 2010) – On petition for rehearing of Great Basin Water Network v. State Eng'r, 126 Nev. Adv. Op. No. 2, 222 P.3d 665 (2010), an appeal from a district court order denying a petition for judicial review in a water rights action, the Court grants rehearing in part, withdraws the prior opinion, and reverses the district court order, ruling that 1) the State Engineer violated his statutory duty under NRS 533.370(2) by ruling on applications well beyond the one-year statutory limitation without first properly postponing action; and 2) in circumstances in which a protestant filed a timely protest pursuant to NRS 533.365 and/or appealed the State Engineer's untimely ruling, the proper and most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest period.

Buckwalter v. Dist. Ct., 126 Nev. Adv. Op. No. 21 (June 24, 2010) – The Court denies a writ petition challenging a district court order denying a motion to dismiss a medical malpractice action, ruling that a medical expert’s declaration under penalty of perjury as provided in NRS 53.045 can satisfy the affidavit requirement stated in NRS 41A.071.

Ramirez v. State, 126 Nev. Adv. Op. No. 22 (July 1, 2010) – The Court reverses a jury conviction of second-degree felony murder by means of child abuse, neglect, or endangerment, ruling that the jury was not completely and accurately instructed as to the necessary elements of second-degree felony murder and that the improper instruction affected the appellant’s substantial rights. First, the Court reiterated that the second-degree felony-murder rule only applies when the following two elements are satisfied: 1) “where the [predicate] felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act,” and 2) “where there is an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim’s death.” [citing *Labastida v. State*, 115 Nev. 298, 986 P.2d 443 (1999)]. Second, the jury was not properly instructed on the immediate-and-direct-causal-relationship element. Third, the appellant’s substantial rights were affected by the improper instruction because 1) the State failed to specify the felony under which it sought a second-degree felony-murder conviction and, thus, appellant could have been convicted of second-degree felony murder under a potentially invalid predicate offense; and 2) there was conflicting evidence as to whether the appellant or her co-defendant inflicted the victim’s mortal wounds. Because the State’s charging document and the instruction submitted to the jury contained language from both NRS 200.508(1) and NRS 200.508(2), the jury was not specifically instructed as to the predicate felony under which the State’s theory rested.

Reno Newspapers v. Sheriff, 126 Nev. Adv. Op. No. 23 (July 1, 2010) –The Court reverses a district court order denying a petition for a writ of mandamus in an action seeking access to public records, ruling that 1) under NRS 202.3662 an application for a concealed firearms permit is confidential; 2) the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential under NRS 202.3662 and are, therefore, public records under NRS 239.010; 3) however, since post-permit records of investigation, suspension, or revocation may contain information from the application for a concealed firearms permit that is considered confidential under NRS 202.3662, post-permit records of investigation of a permit holder, or suspension or revocation of a permit holder’s permit, may be subject to redaction under NRS 239.010(3).

Renown Health v. Vanderford, 126 Nev. Adv. Op. No. 24 (July 1, 2010) – The Court reverses a district court order dismissing a medical malpractice action, ruling that hospitals do not owe an absolute nondelegable duty to provide competent medical care to their emergency room patients through independent contractor doctors; however, hospitals may be liable for patient injuries under the ostensible agency doctrine previously recognized in Schlotfeldt v. Charter Hospital of Las Vegas, 112 Nev. 42, 910 P.2d 271 (1996).

Strickland v. Waymire, 126 Nev. Adv. Op. No. 25 (July 1, 2010) – On consolidated proper person appeals from a district court summary judgment ordering appellants' recall elections to proceed, the Court reverses, ruling that under Article 2, Section 9 of the Nevada Constitution, which subjects every public officer in Nevada to recall by special election upon the filing of a qualifying recall petition signed by "not less than twenty-five percent (25%) of the number" of registered voters "who actually voted in the state or in the county, district, or municipality [that the officer] represents, at the election in which [the officer] was elected," only the signatures of registered voters who in fact—"actually"—voted at the election in which the public officer was elected counts toward the 25 percent needed to qualify a recall petition.

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. No. 26 (July 1, 2010) – The Court affirms a district court judgment in a wrongful death action, ruling that the district court did not abuse its discretion by imposing non-case concluding sanctions and by not holding a full evidentiary hearing when it struck a defendant's answer, as to liability only, as a discovery sanction pursuant to NRCP 37(b)(2)(C) and NRCP 37(d); the district court exercised its inherent equitable power and properly applied the factors set forth in Young v. Johnny Ribeiro Building, 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990).

City of Reno v. Citizens for Cold Springs, 126 Nev. Adv. Op. No. 27 (July 29, 2010) – The Court affirms in part and reverses in part an amended district court order in a land use action, ruling 1) the City did not violate NRS 278.0282 by conditionally approving amendments to the Reno Master Plan prior to submitting the amendments to the Regional Planning Commission for review, because Resolution 6712 provided that the proposed master-plan amendments would become effective after the Regional Planning Commission determined that they conformed to the regional plan; 2) the City violated former RMC section 18.06.404(d)(1)(b) because there is no substantial evidence showing that it made an adequate finding about planned water services and infrastructure before passing Ordinance 5809; and therefore reversing the district court's finding that the City failed to properly amend the Reno Master Plan and affirming the district court's conclusion that the City violated former RMC section 18.06.404(d)(1)(b).

Carrigan v. Commission on Ethics, 126 Nev. Adv. Op. No. 28 (July 29, 2010) – The Court reverses a district court order denying a petition for judicial review from a decision of the Nevada Commission on Ethics, ruling that the

Commission's censure of an elected public officer for alleged voting violations under NRS 281A.420(2)(c) violates the First Amendment. NRS 281A.420(2)(c) sets forth one of the legal standards for determining whether a public officer must abstain from voting on a particular matter, based on the officer's "commitment in a private capacity to the interests of others." NRS 281A.420(8) defines this commitment to include four specific prohibited relationships between a public official and others and describes a fifth catchall definition as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." The Court ruled that 1) voting by public officers on public issues is protected speech under the First Amendment; 2) because NRS 281A.420(2)(c) directly involves the regulation of protected speech by a public officer in voting, the definitional statute of NRS 281A.420(8)(e) must be strictly scrutinized under a First Amendment overbreadth analysis; 3) applying a strict scrutiny standard, the catchall definition in NRS 281A.420(8)(e) is unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech; and 4) consequently, the district court erred in its interpretation of NRS 281A.420(8)(e) and its application to NRS 281A.420(2)(c).

Boorman v. Nevada Mem'l Cremation Society, 126 Nev. Adv. Op. No. 29 (July 29, 2010) – The Court answers questions certified by United States District Court for the District of Nevada under NRAP 5 relating to the alleged negligent handling of a deceased person's remains, ruling that 1) close family members who were aware of the death of a loved one and to whom mortuary services were being provided may assert an emotional distress claim for the negligent handling of a deceased person's remains against a mortuary: those persons do not need to observe or have any sensory perception of the offensive conduct, and do not need to present evidence of any physical manifestation of emotional distress; 2) the only person who may assert an emotional distress claim against a county coroner for the negligent handling of a deceased person's remains is the person with the superior right to dispose of the decedent's body: that person does not need to observe or have any sensory perception of the offensive conduct, and does not need to present evidence of any physical manifestation of emotional distress; and 3) a claim for conversion of a deceased human body or its parts does not exist under Nevada law.

Quinlan v. Camden USA, Inc., 126 Nev. Adv. Op. No. 30 (July 29, 2010) – The Court affirms in part and vacates in part a district court judgment on a jury verdict in a tort action, ruling that the offer of judgment upon which an award of fees and costs was based was not served according to the rules, since 1) the offer of judgment Camden made under NRS 17.115 and NRCP 68 was sent by facsimile; 2) although Quinlan's lawyer received the offer of judgment, he had not expressly consented to fax service as NRCP 5(b)(2)(D) requires; 3) it was error to shift fees and costs based on Camden's offer of judgment because NRS 17.115, NRCP 5(a), and NRCP 68(a) all require an offer of judgment to be served in compliance

with NRCP 5 and Camden's was not; and 4) with the exception of the fee award, no other reversible error appears.

George L. Brown Ins. v. Star Ins. Co., 126 Nev. Adv. Op. No. 31 (August 12, 2010) – The Court reverses a district court final judgment in an insurance matter, adopting the majority rule regarding indemnification when an indemnitee seeks to be indemnified on claims arising out of the indemnitee's own negligence and requiring that an insurance contract must expressly or explicitly reference the indemnitee's own negligence before an indemnitee may be indemnified for his or her own negligence; and ruling that the district court erred in granting summary judgment in favor of respondents Star Insurance Company, Meadowbrook, Inc., and Meadowbrook of Nevada, Inc. because there are genuine issues of material fact concerning fault that must be decided before the indemnification clause at issue here may be enforced.

Schiff v. Winchell, 126 Nev. Adv. Op. No. 32 (August 12, 2010) – The Court affirms a district court amended judgment in an insurance action, ruling that the district court did not err in determining that the date of the original judgment on a jury verdict, rather than the date of an amended judgment entered on remand, was the appropriate date for determining the rate of prejudgment interest.

Vega v. State, 126 Nev. Adv. Op. No. 33 (August 12, 2010) – The Court affirms in part and reverses in part a jury conviction on two counts of lewdness with a child under the age of 14, one count of attempted sexual assault of a minor under the age of 14, three counts of sexual assault of a minor under the age of 14, one count of sexual assault of a minor under the age of 16, and two counts of open or gross lewdness, ruling on three issues on appeal: 1) appellant Bernardo Vega's constitutional right to confrontation under the Confrontation Clause was violated when the district court erroneously admitted the testimonial statements from an unavailable expert witness without the witness previously being subjected to cross-examination, however, the error did not affect Vega's substantial rights and did not amount to plain error because the testifying expert offered her own opinions independent of those of the unavailable expert witness; 2) the district court properly admitted evidence that the child victim made two suicide attempts during the time period when she was subjected to sexual abuse to demonstrate that Vega had subjected the victim to ongoing and repetitive sexual abuse, and to show the effect and harm the abuse had on the victim; 3) based on the evidence presented at trial, a rational jury could have reasonably determined that the victim was under the age of 14 at the time the sexual assaults charged in counts 4 and 5 occurred, but not when the sexual assault charged in count 9 occurred, thus there was sufficient evidence to support Vega's convictions on counts 4 and 5, but that there was insufficient evidence to support his conviction on count 9.

Rio All Suite Hotel & Casino v. Phillips, 126 Nev. Adv. Op. No. 34 (September 30, 2010) – The Court affirms a district court order denying a petition for judicial review in a workers’ compensation action involving an injury to an employee while descending a staircase in the workplace, establishing the standard to be applied to determine whether an employee seeking workers’ compensation benefits has demonstrated, pursuant to NRS 616C.150(1), that her injury “arose out of” her employment. In situations in which an employee’s injury is caused by a neutral risk—a risk that is not personal to the employee or solely employment-related—the Court adopts the increased-risk test, which evaluates whether the employee was exposed to a risk greater than that faced by the general public. If so, then the employee’s injury is deemed to have arisen out of his or her employment. The Court concluded that the frequency with which Phillips was required to use the stairs subjected her to a significantly greater risk of injury than the risk faced by the general public.

San Juan v. PSC Industrial Outsourcing, 126 Nev. Adv. Op. No. 35 (October 7, 2010) – The Court affirms district court summary judgment, certified as final under NRCP 54(b), in a tort action, ruling that 1) a person who hires an independent contractor is not, without more, vicariously liable to the independent contractor’s employees for their employer’s torts, even though the job involves inherent danger or peculiar risk; 2) this rule does not depend upon the employer being solvent and competent; 3) the Nevada workers’ compensation system covers injured workers without regard to their employer’s solvency; 4) competence, judged after the fact and without regard to the hirer’s knowledge or fault, does not differ meaningfully from negligence; and 5) holding a person who hires an independent contractor vicariously liable when the contractor turns out to be incompetent but not if he proves negligent draws a distinction the law does not support.

J.D. Construction v. IBEX Int’l Group, 126 Nev. Adv. Op. No. 36 (October 7, 2010) – On consolidated appeals from a district court order expunging a mechanic’s lien and from a post-judgment order awarding attorney fees, the Court affirms, ruling that 1) when a property owner seeks to remove a lien under NRS 108.2275 by arguing it is frivolous or excessive, the district court must determine the material facts in order to reach a conclusion regarding whether a lien is frivolous or excessive; 2) in making these factual determinations, the district court is not required to hold a full evidentiary hearing, but instead may base its decision on affidavits and documentary evidence submitted by the parties; 3) while this procedure meets due process requirements, pursuant to the time frame mandated by NRS 108.2275(3), if the district court determines that a hearing is necessary, the hearing must be held within 15 to 30 days of the court’s order for a hearing; 4) while any hearing must be initiated within that time frame, the statute does not require the district court to resolve the matter within that time frame; 5) in evaluating whether a lien is excessive, the district court must use a preponderance-of-the-evidence standard, rather than the reasonable-cause standard used for frivolous liens, and the burden is on the lien claimant to prove

the lien and the amount claimed; and 6) in this case, J.D. Construction had the burden to show the adequacy of its lien, and it failed to do so.

Hoagland v. State, 126 Nev. Adv. Op. No. 37 (October 7, 2010) – The Court affirms a conviction, pursuant to an Alford plea, of DUI in a case involving appellant Hoagland, who was living in his truck and sleeping at the time in an employee parking stall at the Salvation Army in Las Vegas. A security officer told Hoagland to move his truck; Hoagland backed his truck into another vehicle and was subsequently charged with DUI. The Court ruled that 1) necessity may be asserted as a defense to a DUI charge because necessity is a common law defense and the Legislature has not limited its use; 2) however, the district court did not commit error in this case by refusing to instruct the jury on necessity because Hoagland's offer of proof was insufficient as a matter of law to satisfy an element of the defense; 3) Hoagland's offer of proof shows that he parked his truck in a prohibited parking stall at the Salvation Army: his actions created the situation requiring him to operate his truck while under the influence; and 4) as a result, Hoagland's offer of proof does not satisfy the element that the defendant did not substantially contribute to the situation.

Cramer v. State, DMV, 126 Nev. Adv. Op. No. 38 (October 7, 2010) – The Court reviews NRS 50.320, which permits the use of an affidavit to prove a person's blood-alcohol content in certain proceedings, including driver's license revocation hearings, by a person who has been previously qualified to testify as an expert witness by a district court. The Court reverses a district court order denying a petition for judicial review in a Department of Motor Vehicles driver's license revocation action (Cramer v. State, Department of Motor Vehicles, Docket No. 53248), concluding that NRS 50.320 limits the use of an expert witness affidavit to persons previously qualified by a district court to testify as an expert witness and therefore, an administrative hearing officer lacks discretion to admit expert witness testimony by affidavit when the affiant has not been qualified by a district court or the affidavit fails to state the district court in which the affiant was permitted to testify. The Court affirms a district court order granting a petition for judicial review in a Department of Motor Vehicles driver's license revocation action (State, Department of Motor Vehicles v. Joseph, Docket No. 53380), rejecting the suggestion that the district court qualification requirement in NRS 50.320 can be satisfied by way of a stipulation entered into by parties in a separate, unrelated district court case.

Orion Portfolio Servs. 2 v. Clark County, 126 Nev. Adv. Op. No. 39 (October 14, 2010) – The Court answers certified questions, pursuant to NRAP 5, regarding a local government entity's sale of personal property, holding that 1) when a local government entity sells property using the competitive bidding process, it must follow public bidding rules outlined in Chapter 332; and 2) a contract obtained through competitive bidding is void if it materially differs from the contents of the invitation to bid.

In re Candelaria, 126 Nev. Adv. Op. No. 40 (October 14, 2010) – The Court affirms a district court order granting a petition to remove a candidate for justice of the peace from placement on the ballot, defining the eligibility requirements set forth in NRS 4.010(2)(a) and ruling that 1) before being elected or appointed to a justice of the peace position, an attorney must be licensed to practice law for a minimum of five calendar years, which are typically 365-day years, from the date of his or her admission; 2) the plain language of NRS 4.010(2)(a) anticipates a particular, consistent start date to the running of the five-year period that expressly terminates on the election, and the admission date is the most reasonable date to use as beginning the period, 3) therefore, under the language of NRS 4.010(2)(a), Candelaria fails to meet the five-year minimum requirement; and 4) the Court rejects Candelaria’s constitutional challenges to NRS 4.010(2)(a), concluding that the statute does not interfere with the electorate’s right to vote for the candidate of its choice and her right to run for office; nor does it violate equal protection.

American Sterling Bank v. Johnny Mgmt. LV, 126 Nev. Adv. Op. No. 41 (October 28, 2010) – The Court affirms a district court judgment entered after a bench trial in a real property action concerning the application of the doctrine of equitable subrogation where a refinancing mortgage’s due date was accelerated, ruling that 1) under the rule in Restatement (Third) of Property: Mortgages, section 7.6, a lender whose loan proceeds were used to pay the balance of a prior note is equitably subrogated to the former lender’s priority lien position so long as an intervening lienholder is not materially prejudiced [adopted in *Houston v. Bank of America*, 119 Nev. 485, 490, 78 P.3d 71, 74 (2003)]; 2) holders of intervening interests cannot complain about the application of the equitable subrogation doctrine because the intervening lienholder is “no worse off than before the senior obligation was discharged” [citing Restatement (Third) of Prop.: Mortgages § 7.6 cmt. a (1997)]; 3) an intervening lienholder does not suffer an injustice or prejudice precluding equitable subrogation where the terms, including the maturity date, of the refinancing loan are materially different than the terms and maturity date of the senior obligation, because equitable subrogation generally limits the paying lender’s priority to the amount and terms of the retired senior obligation; and 4) however, a materially accelerated maturity date for the paying lender’s loan can, and did in this case, prejudice the intervening lienholder, precluding equitable subrogation.

Schuck v. Signature Flight Support, 126 Nev. Adv. Op. No. 42 (November 4, 2010) – On consolidated appeals from a district court summary judgment in a contract and tort action and a post-judgment order denying a motion for NRCP 60(b) relief, in case arising from alleged damages to appellant Schuck’s aircraft while it was temporarily parked at respondent Signature Flight Support of Nevada, Inc.’s (SFS) facility at McCarran Airport. After more than two years of litigation, SFS moved for summary judgment, which the district court granted. Separately, before granting summary judgment and over Schuck’s objection, the district court awarded Schuck’s original lawyers, who withdrew, judgment for

unpaid fees and costs. Schuck appealed and months later filed an NRCP 60(b) motion for relief from judgment, which the district court denied; Shuck also appealed from that decision. The Court affirmed summary judgment in SFS's favor, reversed the judgment in favor of Schuck's former law firm, and, except to the extent of reversing the withdrawing law firm's judgment, rejected Schuck's NRCP 60(b) appeal, ruling that SFS presented a legally sufficient summary judgment motion which addressed the contract, negligence, and punitive damage claims the complaint pleaded; however, given the withdrawing law firm's dispute with Schuck over the work done and the fees charged, the district court should not have reduced the charging lien under NRS 18.015 to a personal judgment by way of summary proceeding before deciding Schuck's claims against SFS.

Elyousef v. O'Reilly & Ferrario, LLC, 126 Nev. Adv. Op. No. 43 (November 18, 2010) – The Court affirms a district court summary judgment in a legal malpractice action, adopting the double recovery doctrine and ruling that 1) both the doctrines of double recovery and issue preclusion bar appellant Elyousef from recovery against respondents O'Reilly; 2) the double recovery doctrine applies here because the judgment established total recoverable damages before settlement, and the settlement completely satisfied the judgment; and 3) all four of the issue preclusion factors are met in this case.

Wyeth v. Rowatt, 126 Nev. Adv. Op. No. 44 (November 24, 2010) – The Court affirms a district court judgment, certified as final under NRCP 54(b), arising from personal injury and strict products liability actions filed by respondents against appellants after respondents took appellants' drugs for years and were subsequently diagnosed with breast cancer. The matter was presented to a jury, with the assessment of damages being bifurcated, as respondents also sought punitive damages against appellants. A verdict was rendered in respondents' favor, awarding compensatory and punitive damages. On appellants' motion, the district court decreased the amount of damages but denied appellants' motion for a new trial and judgment as a matter of law. On appeal, the Court first upholds the district court's ruling that Nevada law applied to the underlying action because respondents were diagnosed with cancer in Nevada and adopts the "last event necessary" analysis to determine choice of law when an injury involves a slow-developing disease, such as cancer, and under that analysis the last event necessary for a claim against a tortfeasor is the place where the plaintiff becomes ill. The Court next holds that, while the district court abused its discretion when it gave a substantial-factor causation instruction because each party argued its own theory of causation, mutually exclusive of the other, and respondents' injuries were purportedly only caused by one act, the error was harmless. Third, the Court holds that the compensatory and punitive damages awards are supported by substantial evidence and are not excessive. Finally, although the jury improperly and prematurely deliberated punitive damages, the error was cured by the jury's redeliberation and the district court's subsequent granting of the remittitur.

State v. Castaneda, 126 Nev. Adv. Op. No. 45 (November 24, 2010) – The Court reverses a district court order dismissing charges of indecent exposure after concluding that NRS 201.220 is unconstitutionally vague and overbroad, ruling that the common law, as well as the case law concerning the statute, leaves no doubt that a person who intentionally exposes his genitals on a public street corner commits indecent exposure.

Berkson v. LePome, 126 Nev. Adv. Op. No. 46 (December 16, 2010) – The Court affirms in part and reverses in part a district court order dismissing a probate and trust action and from a post-judgment order awarding attorney fees and costs, ruling that 1) NRS 11.340, a statute enacted by the Legislature in 1911 that provides a plaintiff whose judgment is subsequently reversed on appeal with the right to file a new action within one year after the reversal, violates the separation of powers doctrine because it unconstitutionally interferes with the judiciary's authority to manage the judicial process and the Court's ability to finally resolve matters on appeal by precluding subsequent and repetitive efforts to relitigate the same claims; 2) examining the district court's dismissal of the underlying action on preclusion grounds, the order is affirmed because appellants relied solely on NRS 11.340 and failed to provide any arguments to explain why claim and issue preclusion should not apply; and 3) the district court abused its discretion in awarding attorney fees and costs to respondents to sanction appellants for filing a frivolous complaint, and therefore, the post-judgment attorney fees and costs award to respondents is reversed.

Moon v. McDonald Carano Wilson, LLP, 126 Nev. Adv. Op. No. 47 (December 16, 2010) – The Court affirms a district court order dismissing a legal malpractice action, addressing the interaction of NRCP 16.1 mandatory pretrial discovery requirements with the Nevada Arbitration Rules and ruling that cases are not actually in the court-annexed arbitration program until they are assigned to an arbitrator, or ordered or remanded into the program by the district court, and as a result, such cases that are awaiting exemption are not actually in the program during the period prior to exemption, and thus, the deadlines and requirements of NRCP 16.1 continue to apply during this time period.

Pyramid Lake Paiute Tribe v. State Eng'r, 126 Nev. Adv. Op. No. 48 (December 16, 2010) – The Court affirms a district court order denying a petition for judicial review of the State Engineer's ruling in a water rights action, ruling that substantial evidence supports the State Engineer's conclusion that Dodge Flat Basin contains unappropriated water and that any harm to existing water rights or the public's interest is the result of the Pyramid Lake Paiute Tribe's unpermitted use.

Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. Adv. Op. No. 49 (December 16, 2010) – The Court reverses a district court order expunging mechanics' liens and remands, ruling that 1) recent legislative amendments to the mechanic's lien law in NRS 108.2453 did not abrogate or overrule Fondren v. K/L Complex, Ltd.,

106 Nev. 705, 800 P.2d 719 (1990), or Nevada's substantial compliance doctrine; 2) substantial compliance, however, requires notice to be given to the party whose interest the lien claimant is seeking to affect; notice to one owner is not sufficient to affect the interest of other owners; and 3) the actual knowledge exception requires the owner to have actual knowledge of the identity of the lien claimant.

Fanders v. Riverside Resort & Casino, 126 Nev. Adv. Op. No. 50 (December 30, 2010) – The Court reverses a district court summary judgment in an intentional tort and negligence action filed by appellant Juana Fanders after she allegedly was injured by security guards on the premises of her former employer, respondent Riverside Resort and Casino, Inc.; the other respondents were the security guards involved in the incident. The district court granted summary judgment to respondents on all counts based on its conclusion that all of Fanders' claims were precluded by the exclusivity provision of Nevada's workers' compensation statutes; the Court reverses the summary judgment, finding genuine issues of material fact as to whether Fanders' injuries arose out of and in the course of her employment, and thus, whether they were covered by workers' compensation, and remands to the district court for further consideration of Fanders' claims.

Gonski v. Dist. Ct., 126 Nev. Adv. Op. No. 51 (December 30, 2010) – The Court grants a writ petition challenging a district court order compelling arbitration in a construction defect action involving real party in interest's attempt to enforce two arbitration provisions that it drafted with respect to petitioners' purchase of a residential home. Petitioners argued that the two arbitration clauses at issue, one of which was in the purchase agreement and the other of which was contained in a limited warranty, are unconscionable, and thus unenforceable, for a variety of reasons; the district court disagreed and compelled arbitration, causing petitioners to seek mandamus. The Court concludes that the arbitration provisions at issue are unconscionable as to several aspects that, taken together, demonstrate that petitioners were not made fully aware, or given the opportunity to become aware, of the provisions' terms: 1) the circumstances under which the provisions were signed, combined with their nonhighlighted nature, failed to provide petitioners with a meaningful opportunity to agree to the arbitration terms; 2) the first provision misleadingly suggested that real party in interest would pay the arbitration costs, while the second document, purportedly incorporated into the first, required petitioners to pay the initial arbitration costs; 3) most significantly, the provisions' confusing language suggested that NRS Chapter 40 remedies would be fully available, even though the terms of the contract impermissibly waived most Chapter 40 homeowner protections; 4) the provisions impermissibly waived statutory rights designed to effect a public purpose, in favor of real party in interest; and 5) accordingly, the arbitration provisions governing construction defects are unconscionable, and the district court abused its discretion in compelling arbitration, such that mandamus relief is warranted.

City of Las Vegas v. Lawson, 126 Nev. Adv. Op. No. 52 (December 30, 2010) – The Court affirms a district court order denying a petition for judicial review in a workers’ compensation action in which respondent was diagnosed with breast cancer in 1997 and again in 2005 while working as a firefighter with appellant City of Las Vegas, ruling that 1) because respondent did not learn from her physician until 2005 that her breast cancer was related to her work as a firefighter, she gave the City timely notice of her occupational disease claim; 2) substantial evidence supports the appeals officer’s decision that respondent was exposed to a known carcinogen during her employment as a firefighter; 3) there was a “reasonable association” between that carcinogen and breast cancer; 4) under NRS 617.453, it is presumed that Lawson’s breast cancer arose “out of and in the course of [her] employment” and 5) the City failed to rebut the presumption.

AA Primo Builders v. Washington, 126 Nev. Adv. Op. No. 53 (December 30, 2010) – On consolidated appeals from a district court order granting summary judgment and dismissing all claims and counterclaims and from a post-judgment order awarding attorney fees and costs, the Court reverses. Appellant AA Primo appealed the dismissal of its suit to recover money allegedly due from respondents Bertral and Cheri Washington on a 2005 patio remodel job; the dismissal came in 2009, more than three years into the litigation, based on the Secretary of State having revoked AA Primo’s charter to do business as a Nevada limited liability company effective December 1, 2008. AA Primo asked the district court for a stay to give it time to make the annual filings needed to reinstate its charter, but the district court refused, instead granting the Washingtons’ summary judgment motion. AA Primo succeeded in reinstating its charter and then filed a timely motion under NRCP 59 asking the district court to vacate the judgment of dismissal; the district court refused relief, and awarded the Washingtons their fees and costs. The Court rules that dismissal was too harsh a penalty: 1) administrative revocation of a domestic limited liability company’s charter suspends the entity’s right to transact business, not its ability to prosecute an ongoing suit [citing NRS 86.274(5) and NRS 86.505] 2) under NRS 86.276(5) reinstatement retroactively restores the entity’s right to transact business; 3) thus, AA Primo’s suit should not have been dismissed and, having been dismissed, should have been reinstated once AA Primo’s charter was reinstated; and 4) before dismissal, the district court should have given AA Primo the brief stay it requested to seek charter reinstatement.

Yonker Construction v. Hulme, 126 Nev. Adv. Op. No. 54 (December 30, 2010) – The Court dismisses a district court order expunging a mechanic’s lien under NRS 108.2275, ruling that 1) under NRS 108.2275(6)(a), if the district court determines that a mechanic’s lien is frivolous and made without reasonable cause, the court must enter an order releasing the lien and awarding attorney fees and costs to the applicant; and 2) because the challenged order in this appeal reserved the award of attorney fees and costs for a later date, it does not

constitute an appealable order within the terms of NRS 108.2275, rendering the appeal premature.

Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. Adv. Op. No. 55 (December 30, 2010) – The Court affirms a district court order dismissing a tort action, ruling that 1) to avoid dismissal of a case, NRCP 4(i) requires a party who fails to effectuate service of process within 120 days from the filing of the complaint to demonstrate good cause for the delay of service; 2) in 2004, NRCP 4(i) was amended to also require the party to move to enlarge the time for service prior to the expiration of the 120-day service period; 3) if the party fails to move to enlarge the time for service within the 120-day period, the court shall take that failure into consideration in determining good cause for an extension of time; 4) the 2004 amendment to NRCP 4(i) requires district courts to first consider if good cause exists for filing an untimely motion for enlargement of time; 5) only upon a showing of good cause for the delay in filing the motion to enlarge time should the court then employ a complete analysis under *Scrimmer v. District Court*, 116 Nev. 507, 998 P.2d 1190 (2000), to determine whether good cause exists to enlarge the time for service under NRCP 4(i); and 6) here, because appellant Gabriela Saavedra-Sandoval failed to demonstrate good cause for filing her untimely motion to enlarge time, the district court did not abuse its discretion in granting respondent Wal-Mart Stores, Inc.’s motion to dismiss for failure to effect timely service of process.

Personhood Nevada v. Bristol, 126 Nev. Adv. Op. No. 56 (December 30, 2010) – The Court dismisses an appeal from a district court order determining that a proposed initiative violated NRS 295.009’s single-subject rule and enjoining its placement on the general election ballot, ruling that 1) because the deadline for submitting ballot initiative signatures and the November 2010 election have passed, the Court can afford no relief from the district court’s injunctive order, and the appeal is dismissed as moot; and 2) adopting the Restatement (Second) of Judgments, because appellate review was precluded as a matter of law, no preclusive effect is to be given the district court’s order in any subsequent litigation.

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. No. 57 (December 30, 2010) – The Court denies a petition for rehearing of *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ____, 235 P.3d 592 (2010), an appeal and cross-appeal from a district court judgment in a wrongful death action, ruling that precedent is clear under *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990), and *Foster v. Dingwall*, 126 Nev. ____, 227 P.3d 1042 (2010), that the district court had the discretion to strike Goodyear’s answer as to liability only, based upon Goodyear’s failure to attend its own deposition under NRCP 37(d) together with the district court’s inherent equitable power to access the appropriate discovery sanctions based upon the criteria of willfulness, bad faith, and prejudice.