

2011 Nevada Supreme Court Opinion Digest

Dieudonne v. State, 127 Nev. Adv. Op. No. 1 (January 27, 2011) – The Court affirms a conviction pursuant to a guilty plea of conspiracy to commit robbery, robbery with the use of a deadly weapon, and second-degree murder, ruling that 1) a criminal defendant has no right to be sentenced by the judge who accepted his or her plea absent an express agreement or indication by the defendant that the plea was entered with that expectation; 2) in this case, there was no such express agreement; 3) the holding in Buschauer v. State, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990), that witnesses offering oral victim impact statements must be sworn is reaffirmed and 4) while the victim impact witnesses in this case were not sworn, this error does not rise to the level of plain error warranting a new sentencing hearing.

Tuxedo International Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2 (February 10, 2011) – The Court reverses a district court final judgment and remands, setting forth the proper analysis to determine whether a forum selection clause applies to the tort claims pleaded by a plaintiff when the dispute is arguably related to a contract containing an applicable forum selection clause, and ruling that 1) the best approach for resolving this issue is one that focuses first on the intent of the parties regarding a forum selection clause's applicability to contract-related tort claims; 2) if that examination does not resolve the question, the district court must determine whether resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract; 3) if that analysis does not resolve the question, the district court must determine whether the plaintiff's contract-related tort claims involve the same operative facts as a parallel breach of contract claim; and 4) the district court's judgment in this case is reversed and the matter remanded for reexamination under the standard adopted.

Lamb v. State, 127 Nev. Adv. Op. No. 3 (March 3, 2011) – The Court affirms a jury conviction of first-degree murder with the use of a deadly weapon, ruling that 1) the public safety exception to the Miranda rule made admissible Lamb's unwarned statement to the police that "I have a revolver but I found it"; 2) Lamb's claims of pervasive procedural, evidentiary, and instructional error fail; and 3) it was error for the bailiff to communicate with the jury concerning its question without notice to the parties, but in this case the error was non-prejudicial.

Ybarra v. State, 127 Nev. Adv. Op. No. 4 (March 3, 2011) – The Court affirms an order denying a motion to strike the death penalty pursuant to NRS 175.554(5), ruling that 1) the denial of Ybarra's motion to disqualify the post-conviction district court judge based on implied bias did not violate state and federal guarantees of due process because neither the judge's prior legal representation of the victim's family on matters unrelated to the murder nor the case's notoriety in the judge's community would cause an objective person reasonably to question the judge's impartiality; and 2) Ybarra failed to prove by a preponderance of the evidence that he suffered from significant subaverage intellectual functioning and adaptive behavior deficits during the developmental period, which extends to 18 years of

age, and consequently, failed to show that he is mentally retarded as provided in NRS 174.098(7).

J.E. Dunn Nw. v. Corus Constr. Venture, 127 Nev. Adv. Op. No. 5 (March 3, 2011) – The Court affirms a district court order granting summary judgment in a mechanic’s lien priority action resulting from Appellant Dunn’s performance of preconstruction services for the One Las Vegas condominium project and recording of a mechanic’s lien for the work; Respondent Corus Bank provided construction financing for the project and recorded a deed of trust to secure its loan. The Court addresses four issues concerning the visibility requirement for a mechanic’s lien to obtain priority over a deed of trust: 1) the visibility requirement contained in the definition of “commencement of construction” in NRS 108.22112 plainly requires visibility of work performed, including preconstruction services, to establish priority; 2) the 2003 amendments to NRS Chapter 108 [the expansion of the definition of “work” to make preconstruction services lienable] did not affect the long-standing requirement that work must be visible on the property for a mechanic’s lien to take priority over a deed of trust recorded before commencement of construction; 3) the statutory visibility requirement may not be waived by a lender who has actual knowledge of off-site preconstruction services; and 4) the placement of signs and removal of power lines does not constitute visible work.

Simmons Self-Storage Partners v. Rib Roof, 127 Nev. Adv. Op. No. 6 (March 3, 2011) – The Court dismisses an appeal from a district court second amended judgment in consolidated mechanic’s lien actions, ruling that an order arising out of NRS Chapter 108 proceedings to enforce mechanics’ liens does not constitute a final judgment under NRAP 3A(b)(1) when that order implicitly determines the liens’ validity and enters judgment on the lienable amounts, but fails to direct the subject property’s sale. Based on the statutory language governing actions to enforce mechanics’ liens, the purposes behind Nevada’s final judgment rule, and extrajurisdictional authorities, the court must also determine whether the sale may proceed before a judgment can be considered final and appealable.

State v. Lucero, 127 Nev. Adv. Op. No. 7 (March 17, 2011) – The Court affirms an order denying the State’s motion to correct an illegal sentence, ruling that 1) under the substantial-assistance exception, the district court has discretion to reduce or suspend the mandatory minimum sentence if it determines that the defendant rendered substantial assistance; 2) in considering whether the district court has the authority to reduce the 10-year minimum sentence prescribed by NRS 453.3385 when revoking probation pursuant to NRS 176A.630 for a defendant who previously received a suspended sentence because he rendered substantial assistance, the phrase “minimum term of imprisonment prescribed by the applicable penal statute” in NRS 176A.630, which limits the extent to which a district court can reduce the term of imprisonment upon revocation of probation, is ambiguous when applied to NRS 453.3385 in cases where a defendant has rendered substantial assistance; and 3) because the general rules of statutory construction do not resolve that ambiguity, the Court applies the rule of lenity and

concludes that the district court had the authority to reduce the defendant's sentence after it revoked his probation.

Surety Company v. ADCO Credit, 127 Nev. Adv. Op. No. 8 (March 17, 2011) – The Court affirms a district court order granting a petition for judicial review in a Department of Motor Vehicles matter, ruling that under the plain meaning of the phrase “any person” in NRS 482.345, Nevada’s motor vehicle bond statute, a defrauded finance company is a proper claimant under the dealer bond and, thus, the district court properly granted respondent ADCO Credit, Inc.’s petition for judicial review.

Picardi v. Dist. Ct., 127 Nev. Adv. Op. No. 9 (March 31, 2011) – The Court grants a writ petition challenging a district court order compelling arbitration in a contract action, ruling that 1) Nevada public policy favors allowing consumer class action proceedings when the class members present common legal or factual questions but their individual claims may be too small to be economically litigated on an individual basis; 2) a clause in a contract that prohibits a consumer from pursuing claims through a class action, whether in court or through arbitration, violates Nevada public policy; 3) because the class action waiver provision in this matter precludes any form of class action relief, it is contrary to public policy and is therefore unenforceable; 4) because the terms of the arbitration agreement provide that it is void if the class action waiver is found unenforceable, there is no basis on which to compel arbitration; and 5) the district court abused its discretion in compelling arbitration, and writ relief is warranted.

City of Reno v. Bldg. & Constr. Trades, 127 Nev. Adv. Op. No. 10 (March 31, 2011) – The Court affirms a district court order granting a petition for judicial review in a prevailing wage action, ruling that 1) while the district court concluded that the City had a statutory duty to investigate prevailing wage discrepancies, the City had a contractual duty to investigate the prevailing wage discrepancies, and therefore, the Court does not consider the City’s statutory duty; 2) in considering the effect on this case of *Carson-Tahoe Hospital v. Building & Construction Trades*, 122 Nev. 218, 128 P.3d 1065 (2006), because the projects involved in the two cases were financed by differing statutory modes, the facts are distinguishable; and 3) the Labor Commissioner has jurisdiction to ensure prevailing wages are paid on projects receiving STAR bond funds.

BMW v. Roth, 127 Nev. Adv. Op. No. 11 (April 14, 2011) – On consolidated appeals from a district court order granting a new trial in a tort action and from post-judgment orders regarding an award of attorney fees and costs, the Court reverses. The district court granted the new trial based on its finding that BMW’s counsel repeatedly violated a pretrial order in limine based upon NRS 484D.495(4), requiring adults riding in cars to wear seatbelts but providing that violation of the statute is not a moving traffic violation and may not be considered as negligence or misuse or abuse of a product or as causation in any civil action. Because Roth claimed that she was wearing her seatbelt yet was ejected and suffered grave injury due to defects in the car’s safety restraint system, the district court permitted BMW to defend with evidence and argument that Roth had not, in fact, been wearing her seatbelt. The district court issued a limiting

instruction that told the jury it could consider the seatbelt evidence only in evaluating Roth's claims against BMW that the subject vehicle was defective and unreasonably dangerous. The district court found BMW's counsel went out of these bounds in voir dire, opening statement, and closing argument, committing prejudicial misconduct that merited a new trial under *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). The Supreme Court reversed, ruling that 1) for violation of an order in limine to constitute attorney misconduct requiring a new trial, the order must be specific, the violation must be clear, and unfair prejudice must be shown; 2) the district court order in this case parameters were far from clear yet Roth did not object to any alleged violations by BMW of the order in limine until closing argument; 3) applying Lioce's strict standards, the unobjected-to violations did not amount to plain error, nor did two objected-to violations involve misconduct so extreme that the objection and admonishment did not remove its prejudicial effect; and 4) in reaching this conclusion, the Court rejects as error the district court's legal determination that Roth's motion in limine acted as a continuous objection and holds instead that, for violation of an order in limine to constitute objected-to misconduct under Lioce, the complaining party must make a contemporaneous objection when the asserted violation occurs.

Donlan v. State, 127 Nev. Adv. Op. No. 12 (April 28, 2011) – The Court affirms a district court order denying a petition to terminate appellant's duty to register as a sex offender under NRS 179D.490, ruling that 1) someone convicted of a sex offense in another state who now resides in Nevada must continue to register as a sex offender in Nevada even though the requirement to register as a sex offender in the other state has since been terminated by an executive branch administrative action of that state; and 2) the Full Faith and Credit Clause does not require Nevada to dispense with its preferred mechanism for protecting its citizenry by virtue of termination of the duty to register in another state.

American Ethanol v. Cordillera Fund, 127 Nev. Adv. Op. No. 13 (May 5, 2011) – The Court affirms a district court judgment in a corporations action, ruling that 1) the district court should evaluate a number of relevant factors in determining "fair value" as prescribed by the stockholder right-to-dissent statutes; 2) the burden of proving the fair value of a stockholder's corporate shares in a stockholder's right-to-dissent appraisal action falls upon both the dissenting stockholder and the corporation of proving their respective valuation conclusions by a preponderance of the evidence; and 3) in evaluating the fair value, even if neither party satisfies its burden, the district court ultimately must use its independent judgment to determine the fair value.

Liberty Mutual Fire Ins. Co., 127 Nev. Adv. Op. No. 14 (May 5, 2011) – The Court reverses a district court summary judgment in an insurance action involving whether the earth movement exclusion in Powell's insurance policy with Liberty Mutual is enforceable to exclude coverage of the damage to Powell's house and whether the district court erred in granting summary judgment in favor of Liberty Mutual, ruling that 1) whether soil movement caused by a ruptured pipe is included in the scope of the earth movement exclusion is ambiguous, thus the exclusion must be interpreted against Liberty Mutual; 2) the district court erred in

granting Liberty Mutual summary judgment on the breach of contract claim; 3) the district court erred in relying on Schroeder v. State Farm Fire and Casualty Co., 770 F. Supp. 558 (D. Nev. 1991), which held that an earth movement exclusion barred recovery for similar damages to those sustained here, because it is factually distinguishable; and 4) in the interests of justice, the district court's dismissal of the Nevada Unfair Claims Settlement Practices Act claim is reversed as it was based on the summary judgment of the breach of contract claim.

Valley Health System v. Dist. Ct., 127 Nev. Adv. Op. No. 15 (May 6, 2011) – The Court, in denying a writ petition challenging a district court discovery order in a tort action, 1) expands the rule regarding the waiver of an issue on appeal that is not first raised in the district court to include the situation where a party fails to raise an issue before the discovery commissioner and, instead, raises the issue for the first time before the district court; 2) determines the scope of the privilege provided by NRS 439.875; and 3) rules that the requested discovery is not within the protection of NRS 439.875.

Landreth v. Malik, 127 Nev. Adv. Op. No. 16 (May 12, 2011) – On a petition for rehearing of Landreth v. Malik, 125 Nev. Adv. Op. No. 61, 221 P.3d 1265 (2009), an appeal from a district court default judgment, the Court withdraws its prior opinion and reverses the default judgment, ruling that 1) a family court judge maintains all the constitutional powers of a district court judge and the Legislature does not have the constitutional authority to limit the constitutional powers of a district court judge in the family court division; 2) the family court judge in this case did not lack judicial power or authority to consider the substantive and procedural aspects of Malik's complaint and enter judgment in this case merely because it involved a subject matter outside the scope of NRS 3.223; and 3) the district court abused its discretion in upholding the default judgment when Malik did not serve Landreth with proper notice of his intent to seek default after granting Landreth additional extensions to file an answer.

In re AMERCO Derivative Litigation, 127 Nev. Adv. Op. No. 17 (May 12, 2011) – The Court affirms in part and reverses in part a district court order dismissing a shareholder derivative action, ruling that 1) a claim-release clause contained in the Goldwasser settlement agreement reached by different shareholders several years earlier did not release claims that arose after the agreement because the claim release clause only released those claims that existed at the time of the settlement; 2) while the acts of AMERCO's agents are imputed to AMERCO, the in pari delicto defense may not preclude appellants from bringing claims against respondents; 3) on remand the district court must examine the factors in Shimrak v. Garcia-Mendoza, 112 Nev. 246, 251-52, 912 P.2d 822, 826 (1996), and determine whether the in pari delicto defense applies and conduct an evidentiary hearing to determine whether demand was futile; and 4) the alternative grounds for affirming the district court are affirmed in part and reversed in part.

Hobbs v. State, 127 Nev. Adv. Op. No. 18 (May 19, 2011) – The Court affirms in part and reverses in part a jury conviction of domestic battery and injury to other property, ruling that 1) spitting amounts to the "use of force or violence" as contemplated by NRS 200.481 and therefore constitutes battery under that

statute; and 2) the State failed to prove the existence and constitutional validity of appellant Hobbs' prior domestic battery misdemeanor convictions and therefore the enhancement of the domestic battery to a felony and the subsequent adjudication of Hobbs as a habitual criminal were erroneous.

Stockmeier v. State, Bd. of Parole Comm'rs, 127 Nev. Adv. Op. No. 19 (May 19, 2011) – On a proper person appeal and counsel cross-appeal from a district court summary judgment in a tort and civil rights action arising from appellant's attempts to have certain factual statements in his presentence investigation report (PSI) amended to correct alleged factual inaccuracies. The Court affirms in part and reverses in part, ruling that, because Nevada lacks a statutory or administrative process by which a prisoner may challenge alleged inaccuracies in his PSI post-sentencing, any claimed inaccuracy in a PSI must be made to the district court at or before sentencing and, if not resolved in the defendant's favor, on direct appeal to the Supreme Court after sentencing. Thus, in these appeals, neither respondent/cross-appellant Division of Parole and Probation nor the district court had the authority to amend appellant's PSI after he was sentenced, and respondent/cross-appellant Parole Board may properly rely on the PSI when it makes any future parole determinations concerning the appellant.

Ruiz v. City of North Las Vegas, 127 Nev. Adv. Op. No. 20 (May 19, 2011) – The Court reverses a district court order dismissing a petition to vacate an arbitration decision and confirming the decision, ruling that NRS 289.120, which allows an aggrieved peace officer to seek judicial relief for violations of the Peace Officer Bill of Rights, confers standing to an individual peace officer, rather than the union to which he belongs and which pursued arbitration on his behalf, to seek judicial relief from the binding arbitration decision that ensued, even though the peace officer was not a "party" to the arbitration proceeding able to challenge the decision under Nevada's arbitration laws and a union generally cannot assign its collectively bargained-for rights to challenge an arbitration decision to an individual officer. Since the peace officer in the case met the prerequisites for proceeding under NRS 289.120 by grieving the alleged violations internally and under the collective bargaining agreement, the Court reverses the district court's order dismissing the officer's petition to vacate the arbitrator's decision.

State, Bd. of Parole Comm'rs v. Morrow, 127 Nev. Adv. Op. No. 21 (May 26, 2011) – In considering two cases in which different district courts reached different conclusions regarding whether inmates are entitled to due process protections related to their parole release hearings, the Court notes that no statutory due process protections applied in these particular cases, and concludes that, because the possibility of release on parole is not a protectable liberty interest, inmates are not entitled to constitutional or inherent due process rights regarding discretionary parole release. The Court clarifies that *Stockmeier v. State, Department of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), does not create due process rights where no liberty interest exists, and thus, the Parole Board is not required to afford inmates the due process protections enumerated in *Stockmeier*. The

Court rules that in the Morrow appeal, the district court abused its discretion in requiring the State to provide Morrow with a copy of every document the Parole Board considered when it denied him parole, and that the district court properly dismissed Kamedula's complaint because he failed to state a claim against the Parole Board upon which relief may be granted.

Southern California Edison v. Dist. Ct., 127 Nev. Adv. Op. No. 22 (May 26, 2011) – The Court grants a writ petition challenging a district court order determining that a use tax refund matter should proceed as a petition for judicial review under NRS Chapter 233B, rather than as an independent action, clarifying the proper method of challenging the refund claim decisions of the Nevada Tax Commission. The Court concludes that when taxpayers challenge the Commission's decision on sales and use tax refund claims, the matter is subject to judicial review pursuant to the Administrative Procedure Act (NRS Chapter 233B). NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review. However, in this case, real party in interest, the Nevada Department of Taxation, is judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told Edison that trial de novo would be available if Edison was unhappy with the Commission's decision. Therefore, although the APA applies to sales and use tax refund claims, in this instance, the district court erred when it ordered the action to proceed as a petition for judicial review, and Edison's petition for a writ of mandamus is granted.

Sparks v. Alpha Tau Omega Fraternity, 127 Nev. Adv. Op. No. 23 (May 26, 2011) – The Court affirms district court orders granting summary judgments in a tort action, arising from a fight between appellant Sparks and respondent Clack during a college football tailgate event that resulted in an injury to Sparks, who filed suit against the Alpha Tau Omega (ATO) Fraternity and a number of entities and fictitious Doe and Roe defendants and later attempted to substitute Alumni respondents in place of the fictitious defendants. The district court dismissed claims against the Alumni respondents based on the statute of limitations and granted summary judgment in favor of the other entities. The Court rules that 1) the Sparkses did not exercise reasonable diligence under Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 822 P.2d 1100 (1991), in ascertaining the identities of the Doe and Roe defendants, such that their amended complaint could relate back to the date that they filed the first complaint, pursuant to NRCP 10(a); 2) the ATO respondents owed no duty of care to the Sparkses; and 3) the ATO respondents did not possess the ability to control Clack or ratify his actions sufficient to be held liable for Clack's intentional torts.

Clean Water Coalition v. The M Resort, 127 Nev. Adv. Op. No. 24 (May 26, 2011) – The Court reverses a district court summary judgment upholding the constitutionality of a legislative act requiring funds to be transferred from an entity created by agreement among local Clark County governments to the State's general fund for the State's unrestricted general use, ruling that section 18 of Assembly Bill 6 (A.B. 6), 26th Special Session (Nev. 2010), which mandates the

transfer of \$62 million collected by the Clean Water Coalition (CWC) as user fees into the State's general fund, violates the Nevada Constitution. A.B. 6, section 18's purpose is to help correct the State's revenue shortfall through an assessment against one political subdivision of the state that operates in only a specific locality in the state. Because it burdens only the CWC in its efforts to raise revenue for the state, it is an impermissible local and special tax under Article 4, Section 20 of the Nevada Constitution. The Nevada Constitution also prohibits local and special laws where a general law could apply and because A.B. 6, section 18 addresses the State's budget shortfall, which, by its very nature is an issue of concern for all the people of the state, to which a general law could have applied, it also fails under Article 4, Section 21.

Rogers v. State, 127 Nev. Adv. Op. No. 25 (June 2, 2011) – The Court affirms a jury conviction of DUI causing substantial bodily harm, ruling that the appellant's statements to a paramedic that he had smoked marijuana before the resulting accident were not protected by Nevada's doctor-patient privilege.

Reyburn Lawn v. Plaster Development Co., 127 Nev. Adv. Op. No. 26 (June 2, 2011) – The Court reverses the final district court judgment in a constructional defect action, ruling that the indemnity clause in this case does not unequivocally or explicitly state that subcontractor Reyburn would be required to indemnify general contractor Plaster, even if Reyburn was not negligent, and does not clearly require indemnification for Plaster's contributory negligence. Therefore, consistent with *George L. Brown Insurance v. Star Insurance Co.*, 126 Nev. ___, 237 P.3d 92 (2010), the indemnity clause must be interpreted against Plaster; Plaster must prove negligence on the part of Reyburn before the clause is triggered and Plaster may be indemnified only for damages associated with Reyburn's negligence. Additionally, Stuart Reyburn's oral testimony merely responded to a hypothetical line of questioning and the district court erred in finding that Stuart's testimony was a judicial admission of liability. Moreover, there was conflicting evidence in the record regarding whether Reyburn's work was implicated in the defective retaining walls. Thus, the evidence as a whole presented sufficient issues of fact for a jury to decide. Accordingly, the district court erred in granting judgment as a matter of law on Plaster's contractual indemnity cause of action. Because Reyburn's duty to defend Plaster is limited to those claims directly attributed to Reyburn's scope of work and does not include defending against the negligence of other subcontractors or Plaster's own negligence, whether the homeowners' complaint sufficiently alleged negligence on the part of Reyburn, triggering its duty to defend, was also a material issue of fact for the jury to decide. Thus, the district court erred in granting judgment as a matter of law on Plaster's breach of contract cause of action as well. Finally, if the jury determines that the homeowners sufficiently alleged claims involving Reyburn's scope of work, the district court must apportion an award of fees and costs between those actually incurred by Plaster in defending against those claims directly attributable to Reyburn's scope of work and those incurred in defending its own negligence.

Aguilar-Raygoza v. State, 127 Nev. Adv. Op. No. 27 (June 2, 2011) – The Court affirms a jury conviction of felony DUI, ruling that it is not unconstitutional to deny to defendants who exercise their right to a jury trial eligibility for the alcohol treatment diversion program set forth in NRS 484C.340, and that appellant is not eligible for the diversion program insofar as the statute excludes defendants who have previously applied to receive treatment under the statute and defendants who have certain prior DUI convictions.

Lund v. Dist. Ct., 127 Nev. Adv. Op. No. 28 (June 2, 2011) – The Court grants in part and denies in part a writ petition challenging a district court order dismissing certain of petitioner’s counterclaims in a tort action, ruling that 1) under NRCP 13(h), new parties may be added to an action through a counterclaim if there is at least one original party included in the counterclaim and the nonparties meet the joinder requirements under NRCP 19 or 20; 2) the district court manifestly abused its discretion by failing to apply the proper NRCP 13(h) analysis, and the writ petition is granted in part directing the district court to vacate its dismissal order and reconsider the NRCP 13(h) analysis; and 3) as petitioner Lund has failed to provide sufficient analysis on the next necessary analytical step regarding NRCP 19 or 20, however, the writ petition is denied to the extent that Lund seeks reinstatement of his counterclaims, without prejudice to Lund’s ability to seek relief on this point from the district court.

Arguello v. Sunset Station, Inc., 127 Nev. Adv. Op. No. 29 (June 2, 2011) – The Court reverses a district court summary judgment in a tort action, ruling that 1) Arguello is a real party in interest with standing to sue Sunset Station because his insurer only partially compensated him for his claimed losses; 2) the scope of NRS 651.010(1), which limits the liability of hotels for “the theft, loss, damage or destruction of any property brought by a patron upon the premises or left in a motor vehicle upon the premises . . . in the absence of gross neglect by the owner or keeper” of the hotel, does not shield a hotel from liability arising out of the theft of and damage to a guest’s motor vehicle that was parked in the hotel’s valet parking lot; and 3) the district court erred in granting Sunset Station summary judgment based on its determination that NRS 651.010(1) shielded Sunset Station from liability for the theft of and damage to Arguello’s vehicle.

Berrum v. Otto, 127 Nev. Adv. Op. No. 30 (July 7, 2011) – The Court affirms a district court order granting a writ petition in a tax action arising out of an ongoing conflict between Washoe County and taxpayers in Incline Village and Crystal Bay regarding property tax valuation, equalization, and collection, ruling that 1) the district court properly issued a writ of mandamus requiring the Washoe County Treasurer to refund excess taxes paid by the respondent Taxpayers for the 2006-2007 tax year because the Taxpayers paid more than was due and typical administrative remedies to recover overpaid taxes do not apply where the Taxpayers were successful at all levels below; and 2) additionally, the Treasurer had a duty to refund the excess taxes pursuant to NRS 360.2935.

State, Tax Comm’n v. American Home Shield, 127 Nev. Adv. Op. No. 31 (July 7, 2011) – The Court reverses a district court order granting a petition for judicial review in a tax action involving the issue of the law that governs when a Nevada

taxpayer claims a refund from the Nevada Department of Taxation for amounts erroneously paid as insurance premium taxes, ruling that 1) because NRS 680B.120 applies to any and all overpayments of insurance premium taxes, regardless of whether they were made in error or on exempt services, the Taxation Department did not legally err or abuse its discretion when it determined that respondent AHS's refund requests for taxes paid in 2003 and 2004 were barred by NRS 680B.120's one-year limitation period; 2) the district court's reliance on Humboldt County v. Lander County, 24 Nev. 461, 56 P. 228 (1899), for the proposition that an entity like the Department had a duty to refund taxes that it was not entitled to collect, in determining that AHS was entitled to a refund of all of its erroneous tax payments was misplaced; and 3) because NRS 680B.120 is the applicable statute governing AHS's refund request and it does not provide for interest, we hold that the district court erred by determining that AHS was entitled to interest on its refunds for 2005 and 2006, citing State, Dep't of Taxation v. DaimlerChrysler, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (subject matter omitted from a statute is deemed intentional).

Lawrence v. Clark County, 127 Nev. Adv. Op. No. 32 (July 7, 2011) – The Court reverses a district court judgment on the pleadings in a government land dispute action concerning whether state-owned land that was once submerged under a waterway can be freely transferred to respondent Clark County, or whether the public trust doctrine prohibits such a transfer, ruling that 1) the public trust doctrine is expressly adopted in Nevada; 2) whether the formerly submerged land is alienable, such that it can be transferred to Clark County, turns on the unanswered questions of whether the stretch of water that once covered the land was navigable at the time of Nevada's statehood, whether the land became dry by reliction or by avulsion, and whether transferring the land contravenes the public trust; and 3) the district court judgment underlying the appeal, which determined that the disputed land is transferable to Clark County, must be reversed and the matter remanded for determinations as to whether the disputed land was submerged beneath navigable waters at the time of Nevada's statehood, how it became dry land, and, if necessary, whether its transfer accords with the public's interest in it.

Benchmark Insurance Company v. Sparks, 127 Nev. Adv. Op. No. 33 (July 7, 2011) – The Court affirms a district court order in an insurance coverage action involving whether an automobile liability insurer effectively limited its duty to defend its policyholder in a tort lawsuit brought against the policyholder, ruling that 1) a provision in Benchmark Insurance Company's standard-form insurance policy permitting Benchmark to terminate its duty to defend the policyholder by depositing the policy's liability limits with the district court is ambiguous; 2) the ambiguous provision must be construed in accordance with the reasonable expectations of the policyholder; and 3) because a policyholder in Sparks' position would reasonably expect his insurer to procure a settlement on his behalf or defend him until the policy limits have been used to satisfy a judgment entered against him, the district court's order in which it denied Benchmark's motion for summary judgment is affirmed.

Saletta v. State, 127 Nev. Adv. Op. No. 34 (July 7, 2011) – The Court reverses a jury conviction of indecent or obscene exposure, ruling that NRS 175.531 allows the district court some discretion in its polling method, the district court’s polling method is reviewed for an abuse of discretion, and it will constitute reversible error if the totality of the circumstances indicate that the polling method was coercive. The Court adopts the three factors that the Second Circuit Court of Appeals identified in U.S. v. Gambino, 951 F.2d 498, 501-02 (2d Cir. 1991), for evaluating the coerciveness of a polling method: 1) whether counsel objected to the polling, 2) whether the district court gave a cautionary instruction to the jury before excusing the jury for further deliberation, and 3) the amount of time that it took the jury to reach a verdict after deliberation resumed. The Court further holds that 1) NRS 175.531 limits the district court’s options for addressing a non-unanimous jury poll and prohibits the district court from questioning jurors regarding their reasons for retreating from the verdict; 2) although the district court’s polling method was not coercive and the district court did not abuse its discretion by continuing to poll the jury after a juror retreated from the verdict, the district court erred by questioning the dissenting juror; and 3) the error was plain, and it affected appellant David Saletta’s substantial rights.

Jitnan v. Oliver, 127 Nev. Adv. Op. No. 35 (July 7, 2011) – On consolidated appeals from a district court judgment and an order awarding attorney fees and costs, the Court affirms, ruling that 1) the district court abused its discretion in denying a challenge for cause to a prospective juror; 2) when a prospective juror expresses a potentially disqualifying opinion or bias and is inconsistent in his or her responses regarding that preconception upon further inquiry, the district court must set forth, on the record, the reasons for its grant or denial of the challenge for cause; 3) the district court erred in failing to do so; and 4) the judgment of the district court is nevertheless affirmed because the case was ultimately tried by a fair and impartial jury such that there was no prejudicial error requiring reversal.

Costello v. Casler, 127 Nev. Adv. Op. No. 36 (July 7, 2011) – The Court reverses a district court summary judgment in a tort action, ruling that 1) under NRCP 15(c), an amendment to a complaint adding a decedent’s estate as a party to an action will relate back to the date of the original pleading filed prior to the expiration of the statute of limitations that named only the decedent as a party; 2) a decedent’s insurer’s notice and knowledge of the institution of an action may be imputed to the decedent’s estate for purposes of satisfying the relation back requirements of NRCP 15(c); and 3) the district court erred in denying appellant Debbie Costello leave to amend her complaint to add respondent Philip Casler’s estate as a defendant.

Smith v. Kisorin USA, 127 Nev. Adv. Op. No. 37 (July 7, 2011) – The Court affirms a district court summary judgment in a corporations action, ruling that a corporation is not required to deliver a dissenters’ rights notice to all stockholders, irrespective of whether the stockholders hold the stock in street name or are beneficial stockholders because this would place unfeasible requirements on corporations; Nevada corporations are required to send

dissenters' notices only to record stockholders, including those holding the stock in street name.

Redrock Valley Ranch v. Washoe County, 127 Nev. Adv. Op. No. 38 (July 7, 2011) – The Court affirms a district court order denying a petition for judicial review of a county's special use permit denial. Redrock Valley Ranch, LLC (RVR) proposes to export water from one hydrographic basin to another in northern Nevada. Both basins lie in Washoe County. The State Engineer approved the transfer applications, but Washoe County declined to grant RVR a special use permit for the pipelines, pump houses, and other infrastructure needed to make the water exportation plan a reality. The Court ruled that the State Engineer's ruling neither preempted nor precluded Washoe County from denying RVR's application for a special use permit for the reasons it did and that substantial relevant evidence supported Washoe County's denial of the special use permit, citing *Serpa v. County of Washoe*, 111 Nev. 1081, 1085, 901 P.2d 690, 693 (1995).

Pasillas v. HSBC Bank USA, 127 Nev. Adv. Op. No. 39 (July 7, 2011) – The Court reverses a district court order denying a petition for judicial review arising out of Nevada's Foreclosure Mediation Program, ruling that a lender commits sanctionable offenses when it does not produce documents and does not have someone present at the mediation with the authority to modify the loan, as set forth in the applicable statute, NRS 107.086, and the Foreclosure Mediation Rules (FMRs).

Leyva v. National Default Servicing Corp., 127 Nev. Adv. Op. No. 40 (July 7, 2011) – The Court reverses a district court order denying a petition for judicial review arising out of Nevada's Foreclosure Mediation Program, ruling that 1) the Foreclosure Mediation statute, NRS 107.086, and the Foreclosure Mediation Rules (FMRs) dictate that a homeowner, even if he or she is not the named mortgagor, is a proper party entitled to request mediation following a notice of default; 2) strict compliance in document production is compelled by NRS 107.086(4) and (5); 3) Wells Fargo failed to produce the documents required under NRS 107.086(4); and 4) failure to do so is a sanctionable offense, and the district court is prohibited from allowing the foreclosure process to proceed.

Dynalectric Company v. Clark & Sullivan, 127 Nev. Adv. Op. No. 41 (July 14, 2011) – The Court affirms an amended district court judgment following a bench trial in a contract action, ruling that the measure of damages applicable to promissory estoppel claims is based upon a flexible approach as suggested in the Restatement (Second) of Contracts and in any given case turns on considerations of what justice requires and the foreseeability and certainty of the particular damages award sought. The presumptive measure of damages for a general contractor that reasonably relies upon a subcontractor's unfulfilled promise is the difference between the nonperforming subcontractor's original bid and the cost of the replacement subcontractor's performance.

Winkle v. Warden, 127 Nev. Adv. Op. No. 42 (July 14, 2011) – The Court grants a writ petition directing respondents to release petitioner to a program for alcohol

treatment and residential confinement pursuant to NRS 209.425 through NRS 209.429, ruling that 1) the express language of NRS 209.427 and NRS 209.429 requires the Director to assign an eligible offender to the 305 Program for alcohol treatment and residential confinement one year prior to parole eligibility; 2) the express language of NRS 209.429(4)(a) deems an assignment to the program as “imprisonment” for purposes of NRS 484C.430 and “not a release on parole”; and 3) because petitioner is within one year of parole eligibility and is otherwise eligible for the program, respondents must release her to the 305 Program.

Rose v. State, 127 Nev. Adv. Op. No. 43 (July 21, 2011) – The Court reverses a jury conviction of second-degree murder with the use of a deadly weapon, ruling that 1) assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony murder and therefore cannot be used as the basis for a second-degree felony-murder conviction; 2) whether the felony is assaultive must be determined by the jury based on the manner in which the felony was committed; 3) because the crime at issue here, assault with a deadly weapon, could be assaultive based on the manner in which it was committed, the district court erred when it failed to instruct the jury to determine whether the felony underlying the second-degree felony-murder theory was assaultive based on the manner in which the felony was committed; and 4) the error was not harmless beyond a reasonable doubt.

Cortes v. State, 127 Nev. Adv. Op. No. 44 (July 21, 2011) – The Court affirms a jury conviction of possession of a controlled substance with intent to sell, ruling that the search which produced the evidence underlying the conviction was constitutional. During a routine traffic stop, the police developed what the district court found was a reasonable suspicion that the appellant, a passenger, was armed and dangerous. The police ordered appellant out of the car and subjected him to a patdown search, which produced the evidence underlying the conviction. Since the finding of reasonable suspicion was sound, no Fourth Amendment violation occurred (citing *Arizona v. Johnson*, 555 U.S. ___, 129 S. Ct. 781 (2009)).

Williams v. Dist. Ct., 127 Nev. Adv. Op. No. 45 (July 28, 2011) - The Court rules on consolidated writ petitions raising two novel issues involving the admissibility of expert testimony: 1) whether a nurse can testify as an expert regarding medical causation, and 2) whether defense expert testimony offering alternative causation theories must meet the “reasonable degree of medical probability” standard set forth in *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 155, 111 P.3d 1112, 1114 (2005). The Court concluded that writ relief is granted in part and denied in part, ruling that 1) a nurse can testify regarding matters within his or her specialized area of practice, but not as to medical causation unless he or she has obtained the requisite knowledge, skill, experience, or training to identify cause; 2) the standard for defense expert testimony regarding medical causation differs depending on how the defendant utilizes the expert’s testimony; 3) when a defense expert traverses the causation theory offered by the plaintiff and purports to establish an independent causation theory, the testimony must be stated to a reasonable degree of medical probability pursuant to *Morsicato*;

and 4) however, when a defense expert's testimony of alternative causation theories controverts an element of the plaintiff's prima facie case where the plaintiff bears the burden of proof, the testimony need not be stated to a reasonable degree of medical probability, but it must be relevant and supported by competent medical research.

City of Oakland v. Desert Outdoor Adver., 127 Nev. Adv. Op. No. 46 (August 4, 2011) – The Court affirms a district court order granting a motion for NRCP 60(b) relief from a domesticated foreign judgment involving involves an attempt by appellant City of Oakland to enforce, in Nevada, a California civil judgment against respondent Desert Outdoor Advertising, Inc. Recognizing that Huntington v. Attrill, 146 U.S. 657 (1892), provides an exemption to the Full Faith and Credit Clause of the United States Constitution, such that other states' penal judgments are unenforceable in the State of Nevada, the Court concludes that the California judgment in this case was penal in nature and, as such, is not enforceable in Nevada.

LVMPD v. Coregis Insurance Co., 127 Nev. Adv. Op. No. 47 (August 4, 2011) – The case involves consolidated appeals from a district court summary judgment in an insurance action and from a post-judgment order denying an NRCP 60(b) motion. Appellant Las Vegas Metropolitan Police Department (LVMPD) was named as a defendant in a federal district court action alleging civil rights violations. LVMPD had an insurance policy with respondent Coregis Insurance Company to protect against liability for police officer actions when the damages exceeded a certain amount. Coregis denied LVMPD coverage for the civil rights claims because LVMPD did not notify Coregis of LVMPD's potential liability until ten years after the incident that led to the civil rights lawsuit. LVMPD settled the civil rights action, incurring fees and costs in defending the case. LVMPD then filed a declaratory-judgment action seeking a judicial determination that Coregis was required to defend and indemnify LVMPD for damages related to the civil rights claims. On Coregis's motion, the district court entered summary judgment in favor of Coregis, concluding that LVMPD's notice was clearly late and that Coregis was prejudiced by the late notice. The Court reverses the district court's summary judgment and, in accordance with the majority of jurisdictions and with the express language of NAC 686A.660(4), adopts a notice-prejudice rule, ruling that 1) the district court erred in granting Coregis summary judgment when there were still genuine issues of material fact as to whether notice was late; and 2) when an insurer denies coverage of a claim because notice of the claim was late, the insurer must show (a) that notice was late and (b) that it was prejudiced by the late notice.

Roethlisberger v. McNulty, 127 Nev. Adv. Op. No. 48 (August 4, 2011) – The Court affirms a district court order denying a motion for a change of venue in a tort action, ruling that 1) as venue was not improper as to appellant, he lacked standing to challenge venue based on his codefendant's place of residence and demand that venue be changed under NRS 13.040; and 2) as to the discretionary venue provision concerning convenience and the ends of justice,

the district court did not abuse its wide discretion under NRS 13.050(2) in refusing to change the place of trial.

Rennels v. Rennels, 127 Nev. Adv. Op. No. 49 (August 4, 2011) – The Court reverses a district court order granting respondents’ motion to terminate grandparent visitation with respondents’ minor child, ruling that 1) the stipulated visitation order entered pursuant to NRS 125C.050 between a parent and a grandmother was a final decree entitled to res judicata protections; 2) while the parental presumption applies at the time of the court’s initial determination of a nonparent’s visitation rights, when, as in this case, a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling; 3) the two-prong test enunciated in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), is adopted in circumstances where a party seeks to modify or terminate a nonparent’s judicially approved visitation rights with a minor child; 4) modification or termination of a nonparent’s judicially approved visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child’s welfare such that it is in the child’s best interest to modify the existing visitation arrangement; and 5) applying the test to this case, the district court failed to articulate any substantial change in circumstances before it terminated appellant’s nonparent visitation rights with her granddaughter and, therefore, it is not in the best interests of the child to terminate visitation.

Hawkins v. State, 127 Nev. Adv. Op. No. 50 (August 4, 2011) – The Court affirms a jury conviction of conspiracy to violate the Uniform Controlled Substances Act, rejecting appellant’s contention that the district court erred by rejecting his challenges to the State’s peremptory challenges of three jurors as impermissible race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Gallegos v. Malco Enterprises of Nevada, 127 Nev. Adv. Op. No. 51 (August 4, 2011) – The Court reverses a district court summary judgment in an insurance action, ruling that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment. By way of brief background, Gallegos was injured by appellant David Gonzalez while Gonzalez was driving a car rented from respondent Malco Enterprises of Nevada, Inc., d.b.a. Budget Rent A Car of Las Vegas, with a supplemental renter’s liability insurance (RLI) policy from Budget issued by respondent First American Property and Casualty Insurance Company, and managed by respondent Knight Management Insurance Services, LLC. Gallegos sued Gonzalez and obtained a default judgment; Gonzalez failed to appear at scheduled judgment debtor exams, however, and Gallegos was unable to collect on the judgment. Accordingly, Gallegos sought a judicial assignment of Gonzalez’s unasserted claims against respondents, which was granted, and then brought the assigned claims against respondents in a separate district court action. The district court in the underlying action concluded that the previous district court’s assignment order was invalid and thus granted respondents’ motion for summary judgment.

Yellow Cab of Reno v. Dist. Ct., 127 Nev. Adv. Op. No. 52 (August 4, 2011) – The Court denies a writ petition challenging a district court order denying a

motion for summary judgment in a personal injury action, ruling that, while the district court did not render a thorough resolution of the issues before it on summary judgment, the Court will generally not exercise its discretion to consider a writ petition challenging a denial of summary judgment [citing Smith v. District Court, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997)]; denial of the writ petition, however, is without prejudice to the district court re-evaluating the propriety of summary judgment regarding Yellow Cab's NRS 706.473-based independent contractor argument in light of the analysis set forth in the opinion.

Otak Nevada, LLC v. Dist. Ct., 127 Nev. Adv. Op. No. 53 (September 8, 2011) – The Court grants a writ petition challenging district court orders entered in a tort action, ruling that NRS 11.259(1) compels dismissal where the initial pleading in an action alleging nonresidential construction malpractice was served without filing the attorney affidavit and expert report required by NRS 11.258(1) and (3) [citing Fierle v. Perez, 125 Nev. ___, 219 P.3d 906, 914 (2009)]; such a pleading is void ab initio and of no legal effect and, thus, cannot be cured by amendment.

Adam v. State, 127 Nev. Adv. Op. No. 54 (September 22, 2011) – The Court affirms a jury conviction of trafficking in a controlled substance, ruling that the procuring agent defense - which generally provides that if a defendant is an agent of the purchaser, then the defendant should only be held as culpable as the purchaser - is inapplicable to trafficking charges, regardless of the theory the defendant is charged under.

Ford v. State, 127 Nev. Adv. Op. No. 55 (September 29, 2011) – The Court reverses a jury conviction of pandering of prostitution, ruling that 1) the statute under which appellant was convicted, NRS 201.300(1)(a), is not unconstitutionally overbroad and vague because it does not, as appellant argues, impose strict liability on a person who unintentionally causes another to engage in prostitution; 2) rather, NRS 201.300(1)(a) criminalizes the act of soliciting another person with the specific intent that, in response to the solicitation, she “become a prostitute” or “continue to engage in prostitution;” 3) the jury instructions, however, did not adequately describe the specific intent required for pandering, but rather provided some problematic instructions on general intent; and 4) although appellant did not object to the failure to instruct on specific intent, the error was plain, and the failure to give a specific intent instruction affected appellant’s substantial rights.

State v. Hughes, 127 Nev. Adv. Op. No. 56 (September 29, 2011) – The Court reverses a district court order dismissing a charge of production of child pornography, ruling that 1) the term “minor” as used in NRS 200.710 is not unconstitutionally vague because it has a well-settled and ordinarily understood meaning: an individual under 18 years of age; 2) under NRS 200.710 it is unlawful to use a person under 18 years of age in producing a pornographic performance; and 3) the distinction between the Legislature adopting 16 years as the age of consent for sexual relations [NRS 200.364], yet choosing to legalize the visual memorialization of the same, consented-to, sexual conduct only when all participants are at least 18 years of age, has a rational basis.

City of North Las Vegas v. State, EMRB, 127 Nev. Adv. Op. No. 57 (September 29, 2011) – The Court affirms a district court order denying a petition for judicial review in a local government employment matter, ruling that 1) the six-month deadline for filing claims with the Employee-Management Relations Board (EMRB) under NRS 288.110(4) is subject to equitable tolling; 2) in this case equitable tolling applied to allow the EMRB to hear respondent Spannbauer's claims of NRS Chapter 288 violations because he was diligent in filing his claims after acquiring knowledge of such violations; and 3) there was substantial evidence to support the EMRB's findings that respondent Spannbauer's employers impermissibly interfered with his right to a predisciplinary hearing and discriminated against him on the basis of gender.

Weddell v. Stewart, 127 Nev. Adv. Op. No. 58 (September 29, 2011) – On motions for reconsideration of Supreme Court order dismissing appeal from an order awarding attorney fees in a pending case (Docket No. 55981) and of supreme court order dismissing appeal from an order denying a motion to set aside a judgment in a closed case (Docket No. 56473), the Court rules that, unless a party is exempt from paying the requisite fee, the Court will not consider the merits of any matter presented for filing until the requisite fee has been paid, and failure to pay the requisite fee in a timely manner will result in dismissal.

Daane v. Dist. Ct., 127 Nev. Adv. Op. No. 59 (September 29, 2011) – The Court denies a writ petition seeking to preclude further foreclosure mediation proceedings under NRS 107.086 and the Foreclosure Mediation Rules with respect to petitioner's residence, ruling that petitioner has an adequate remedy in the ordinary course of law.

Francis v. Wynn Las Vegas, 127 Nev. Adv. Op. No. 60 (October 6, 2011) – The Court affirms a district court summary judgment in a contract action, ruling that 1) in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination, the district court should balance the interests of the invoking party and the opposing party's right to fair treatment; 2) in the instant case, the district court did not abuse its discretion in refusing to permit appellant to withdraw his invocation or in denying his request to reopen discovery; and 3) the district court did not abuse its discretion in denying appellant's NRCP 56(f) motion, nor did it err in granting respondent summary judgment.

Emerson v. Dist. Ct., 127 Nev. Adv. Op. No. 61 (October 6, 2011) – The Court denies a writ petition challenging a district court order imposing sanctions on petitioner, ruling that 1) the district court retains jurisdiction after it enters an order dismissing a case with prejudice pursuant to a stipulation of the parties under NRCP 41(a)(1)(ii) to consider sanctions for attorney misconduct that occurred prior to the dismissal; and 2) the district court did not abuse its discretion by imposing as a sanction attorney fees and costs incurred in the original trial when a new trial was ordered, and therefore, writ relief is not warranted.

City of North Las Vegas v. Warburton, 127 Nev. Adv. Op. No. 62 (October 6, 2011) – The Court affirms a district court order granting a petition for judicial

review in a workers' compensation action, ruling that 1) the proper calculation of the average monthly wage of an injured employee who claims to have changed jobs as of the day of the employee's industrial accident is established in NAC 616C.444, which bases the calculation of the average monthly wage for such an employee on payroll information regarding the employee's primary job at the time of the accident; 2) although the administrative appeals officer in this case failed to make any specific findings regarding respondent's primary job at the time of her accident, substantial evidence supports the district court's determination that respondent's primary job at the time of the accident was that of pool manager; and 3) the appeals officer's conclusion that respondent's average monthly wage had to be calculated based on the rate of pay of a water safety instructor is not supported by substantial evidence (affirming the district court's order granting judicial review and reversing the appeals officer's decision).

Merits Incentives v. Dist. Ct., 127 Nev. Adv. Op. No. 63 (October 6, 2011) – The Court denies a writ petition challenging a district court order denying a motion to dismiss or, alternatively, to disqualify counsel and to prohibit the use of certain information, when opposing counsel reviewed confidential documents he received, unsolicited, from an anonymous source. The Court rules that although there is no Nevada Rule of Professional Conduct that specifically governs an attorney's actions under these facts, the attorney in this case fulfilled any ethical duties by giving prompt notification to opposing counsel, soon after his receipt of the disk from an unidentified source, through an NRCP 16.1 disclosure. The court went on to identify a nonexhaustive list of factors a district court should consider when presented with a motion to disqualify an attorney who has received an opposing party's privileged information, yet played no part in obtaining the information:

- 1) [W]hether the attorney knew or should have known that the material was privileged;
- 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- 5) the extent to which movant may be at fault for the unauthorized disclosure; [and]
- 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

The Court concludes in this case that the factors weigh in favor of the district court's decision, and therefore, writ relief is not warranted.

G.C. Wallace, Inc. v. Dist. Ct., 127 Nev. Adv. Op. No. 64 (October 6, 2011) – The Court denies a writ petition challenging the district court’s jurisdiction in a real property action, ruling that 1) NRS 40.253 must be construed as exempting summary eviction proceedings from the doctrine of claim preclusion in some instances; and 2) although the doctrine of claim preclusion would ordinarily prevent a landlord from bringing a damages claim in district court for breach of the lease agreement after previously seeking summary eviction in justice court, an exception to claim preclusion applies in such a circumstance and therefore, writ relief is not warranted.

Stephans v. State, 127 Nev. Adv. Op. No. 65 (October 6, 2011) – The Court affirms in part, reverses in part and remands on a jury conviction of conspiracy to commit larceny, burglary, and grand larceny, affirming the burglary and conspiracy convictions, and reversing and remanding on the grand larceny charge, ruling that testimony from a department store’s loss prevention officer, over the defense’s foundation, hearsay, and best evidence objections, that the stolen goods bore price tags adding up to \$477, was not sufficient proof that the stolen goods had a value of \$250 or more.

Walters v. Dist. Ct., 127 Nev. Adv. Op. No. 66 (October 13, 2011) – The Court denies a writ petition challenging district court orders denying a motion for partial summary judgment and granting, in part, a motion for summary judgment in a breach of a loan guaranty action, ruling that the counterclaim, cross-claim, and written motion setting the grounds for the application and the relief sought satisfies the requirements of NRS Chapter 40 for seeking a deficiency judgment based upon a breach of guaranty.

State, Dep’t of Taxation v. Masco Builder, 127 Nev. Adv. Op. No. 67 (October 20, 2011) – The Court affirms a district court order granting a petition for judicial review in a tax matter, ruling that 1) the Nevada Tax Commission improperly substituted its own judgment for that of an administrative law judge in reversing the judge’s determination that the taxpayer was entitled to a refund because substantial evidence supported the ALJ’s conclusion; and 2) the statute of limitations governing the time within which a taxpayer must file a formal refund claim should be equitably tolled when the Department of Taxation has led the taxpayer to believe that a formal filing was unnecessary.

Wilson v. State, 127 Nev. Adv. Op. No. 68 (October 27, 2011) – The Court affirms an order dismissing a post-conviction petition for a writ of habeas corpus in a death penalty case, ruling that where a defendant pleads guilty to a charge of first-degree murder based on theories of premeditation and deliberation and felony murder, the State is not precluded from seeking the death penalty based on a felony aggravator using the felony murder’s predicate felony.

Nunnery v. State, 127 Nev. Adv. Op. No. 69 (October 27, 2011) – The Court affirms a jury conviction of first-degree murder with the use of a deadly weapon, two counts of attempted murder with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, two counts of attempted robbery with the use of a deadly weapon, and a sentence of death,

ruling with regard to appellant's claims related to the penalty phase of the trial that 1) the district court has discretion to allow an untimely notice of evidence in aggravation under SCR 250(4)(f) upon a showing of good cause and that the relevant factors include the danger of prejudice to the defense in its preparation as a result of the untimely notice; 2) the confidentiality provision in NRS 176.156 does not preclude the admission of presentence investigation reports at penalty hearings at the discretion of the trial judge; and 3) appellant's Sixth Amendment trial rights were not violated when the district court declined to instruct the jury that it must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances before it could find him eligible for the death penalty, because the weighing of the aggravating and mitigating circumstances is not a factual determination subject to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), and because Nevada's statutory scheme focuses on whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, not whether the aggravating circumstances outweigh the mitigating circumstances.

Cervantes v. Health Plan of Nevada, 127 Nev. Adv. Op. No. 70 (October 27, 2011) – The Court affirms a district court summary judgment in a tort action arising from appellant's alleged contraction of hepatitis C as a result of treatments she received at the Endoscopy Center of Southern Nevada (ECSN), ruling that appellants claims against respondent health care providers were preempted by ERISA section 514(a), in that ERISA section 514 precludes state law claims of negligence and negligence per se against a managed care organization contracted by an ERISA plan to facilitate the development of the ERISA plan's network of health care providers.

Pacificare of Nevada v. Rogers, 127 Nev. Adv. Op. No. 71 (October 27, 2011) – The Court reverses a district court order denying a motion to compel arbitration in a tort and contract action, ruling on two issues regarding the enforceability of an arbitration provision: 1) because the parties in this case did not expressly rescind the arbitration provision at issue, the provision survived the contract's expiration and it was properly invoked; and 2) a plaintiff may not rely on Nevada's unconscionability doctrine to invalidate an arbitration provision contained in a contract governed by the federal Medicare Act since the Medicare Act expressly preempts any state laws or regulations with respect to the type of Medicare plan at issue and Nevada's unconscionability doctrine is preempted to the extent that it would regulate federally approved Medicare plans.

Canarelli v. Dist. Ct., 127 Nev. Adv. Op. No. 72 (November 10, 2011) – The Court grants a writ petition challenging district court orders requiring petitioner to serve as trustee for a dissolved corporation in a constructional defect action, ruling that NRS 78.600 does not confer authority upon the district court to appoint an unwilling director trustee of a dissolved corporation for the purpose of defending actions against the corporation that arose post-dissolution and after completion of the winding-up process, because, once the director trustee has completed winding up the affairs of the corporation as provided for in NRS 78.590, his or her power to act on behalf of the corporation terminates.

Chateau Vegas Wine v. S. Wine & Spirits, 127 Nev. Adv. Op. No. 73 (November 23, 2011) – The Court affirms a district court order granting a permanent injunction in a business tort action, ruling that the district court did not abuse its discretion in permanently enjoining appellants from importing and selling certain Bordeaux wines in Nevada, nor in permanently enjoining appellants from importing and selling certain French champagnes in Nevada.

Klasch v. Walgreen Co., 127 Nev. Adv. Op. No. 74 (November 23, 2011) – The Court reverses a district court summary judgment in a wrongful death action, clarifying the duty of care that a pharmacist owes his or her customers and ruling that 1) when a pharmacist has knowledge of a customer-specific risk with respect to a prescribed medication, the learned-intermediary doctrine does not insulate a pharmacist from liability, and the pharmacist instead has a duty to exercise reasonable care in warning the customer or notifying the prescribing doctor of this risk; and 2) since the pharmacist in this case had knowledge of a customer-specific risk, the summary judgment record before the district court was inadequate to conclude, as a matter of law, that no genuine issues of fact remain as to breach of duty and causation of injury.

Friedman v. Dist. Ct., 127 Nev. Adv. Op. No. 75 (November 23, 2011) – The Court grants a writ petition prohibiting the family court from exercising subject matter jurisdiction in an interstate child custody dispute tracing back to a stipulated Nevada divorce decree incorporating the parents' agreement that Nevada would have exclusive jurisdiction over future child custody disputes. The Court rules that, since both parents and the children have subsequently moved to California and the father has initiated competing custody proceedings in California, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), California appears to have jurisdiction as the children's "home state," and Nevada cannot proceed unless California determines that Nevada is the more convenient forum. The Court concludes that since California has not declined jurisdiction, the Nevada district court erred in asserting it.

Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. Adv. Op. No. 76 (November 23, 2011) – The Court affirms a district court summary judgment in a wrongful death action, clarifying an apparent disconnect between NRS 651.015's limitation on innkeeper liability and Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993), and ruling that 1) the duty element of a negligence cause of action must be determined as a matter of law by considering whether the wrongful act that precipitated the plaintiff's injury was foreseeable; 2) NRS 651.015(3)'s definition of "foreseeable" provides the appropriate framework for conducting this inquiry in the context of innkeeper liability by codifying the common-law approach set forth in Doud; and 3) because the district court in this case properly applied NRS 651.015(3) in determining that the act which led to the victim's death was not foreseeable, respondent did not owe the victim a duty as a matter of law.

Public Agency Compensation Trust v. Blake, 127 Nev. Adv. Op. No. 77 (November 23, 2011) – The Court reverses a district court order denying a petition for judicial review in a workers' compensation action, establishing the

proper method of calculating permanent partial disability (PPD) compensation for a subsequent work-related injury when the impairment rating for that injury is based on a different edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, adopted by the Division of Industrial Relations, than were prior injuries. The Court rules that 1) NRS 616C.490(9) is plain and unambiguous and requires that the calculations for prior and subsequent injuries be reconciled by first using the current edition of the AMA Guides to determine both the percentage of the entire disability and the percentage of the previous disability, and then subtracting the latter number from the former to calculate the award for the current injury; and 2) to the extent that NAC 616C.490 allows for computation of PPD compensation without reconciliation of the different editions of the AMA Guides, it impermissibly conflicts with NRS 616C.490 and is invalid.

Choy v. Ameristar Casinos, 127 Nev. Adv. Op. No. 78 (November 23, 2011) – The Court affirms a district court summary judgment in a tort action, reviewing the procedure required by NRCP 56(f) for the party opposing a motion for summary judgment to request the denial or continuance of the motion in order to obtain additional affidavits or conduct further discovery, and reiterating that, by its plain language, NRCP 56(f) requires the party opposing summary judgment provide to an affidavit stating the reasons why denial or continuance of the motion for summary judgment is necessary to allow the opposing party to obtain further affidavits or discovery. Because appellant failed to provide the required affidavit, the district court properly denied appellant’s request for a continuance.

Reno Newspapers v. Gibbons, 127 Nev. Adv. Op. No. 79 (December 15, 2011) – The Court reverses a district court order granting in part and denying in part a petition for a writ of mandamus challenging the former Nevada Governor’s refusal to provide access to or information regarding certain e-mail communications, ruling that 1) after the commencement of a public records lawsuit, the state entity withholding the requested records is required to provide the requesting party with a log containing, at a minimum, a general factual description of each withheld record and a legal basis for nondisclosure; 2) such a log was required in this case, and the district court erred to the extent it denied the request for a log; 3) as mandated by NRS 239.107(1)(d), if a state entity denies a public records request prior to the commencement of litigation, it must provide the requesting party with notice of its claim of confidentiality and citation to legal authority that justifies nondisclosure; and 4) the state entity withholding the requested records in this instance failed to satisfy these responsibilities.

Holt v. Regional Trustee Services Corp., 127 Nev. Adv. Op. No. 80 (December 15, 2011) – The Court affirms a district court order denying a motion for preliminary and permanent injunctions in a real property action involving the Nevada law requiring loan-modification mediation on homeowner request before a nonjudicial foreclosure sale can proceed on an owner-occupied residence, and the subsequent issuance and recording of a Foreclosure Mediation Program (FMP) certificate for a valid foreclosure sale to occur. The Court rules that a lender who has been denied an FMP certificate for failing to mediate in good faith

can reinstate foreclosure by means of a new notice of default and election to sell and rescission of the original, thereby restarting the FMP process, affirming the district court's refusal to enjoin the nonjudicial foreclosure initiated by the second notice of default and election to sell and its further order directing the parties to return to FMP mediation.

Sicor, Inc. v. Sacks, 127 Nev. Adv. Op. No. 81 (December 15, 2011) – The Court dismisses an appeal from a district court order denying without prejudice and deferring a final ruling on a motion to change venue in a tort action, ruling that the district court's decision to await the results of voir dire and jury selection before ruling on whether pretrial publicity warranted a change of venue was appropriate, and that the challenged order is not appealable until the district court finally resolves the motion to change venue, following an attempt to seat an impartial jury.

Sicor, Inc. v. Hutchison, 127 Nev. Adv. Op. No. 82 (December 15, 2011) – The Court affirms a district court order denying a motion for a change of venue in a tort action, clarifying the test to be applied when evaluating post-voir dire motions for a change of venue based on pretrial publicity in civil proceedings, expanding upon the analysis first set forth in National Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 939 P.2d 1049 (1997), and ruling that the district court must apply a multifactor test to determine whether there is a reason to believe that the party seeking a change of venue will not receive a fair trial in the community where the case originated, based upon the following factors: 1) the nature and extent of pretrial publicity; 2) the size of the community; 3) the nature and gravity of the lawsuit; 4) the status of the plaintiff and defendant in the community; 5) the existence of political overtones in the case; 6) the amount of time that separated the release of the publicity and the trial; 7) the care used and the difficulty encountered in selecting a jury; 8) the familiarity of potential jurors with pretrial publicity; 9) the effect of the publicity on the jurors; and 10) the challenges exercised by the party seeking a change of venue. Because appellants have not demonstrated that the circumstances presented here warrant a reasonable belief that a fair trial of this case could not be had in Clark County, the Court concludes that the district court did not manifestly abuse its discretion by denying appellants' motion for a change of venue.

Munda v. Summerlin Life & Health Ins. Co., 127 Nev. Adv. Op. No. 83 (December 29, 2011) – The Court reverses a district court order granting a motion to dismiss a tort action, ruling that, under the set of facts alleged, state law claims of negligence and negligence per se are not preempted by the Employee Retirement Income Security Act (ERISA) because respondent's alleged actions were independent of the administration of the ERISA plan (distinguishing Cervantes v. Health Plan of Nevada, 127 Nev. __, __ P.3d __ (Adv. Op. No. 70, October 27, 2011)).

State v. Dist. Ct. (Armstrong), 127 Nev. Adv. Op. No. 84 (December 29, 2011) – The Court denies a writ petition challenging an order of the district court granting in part the real party in interest's motion to preclude the introduction of his blood alcohol test results in a DUI prosecution, ruling that 1) although retrograde

extrapolation evidence is relevant in a DUI prosecution, under certain circumstances such evidence may be unfairly prejudicial and therefore inadmissible; and 2) because the prosecution in this case had to rely on the results from a single blood sample and a number of the factors that affect the mathematical calculation necessary to a retrograde extrapolation were unknown, the district court did not manifestly abuse or arbitrarily or capriciously exercise its discretion in concluding that the evidence would be unfairly prejudicial.

In re Fontainebleau Las Vegas Holdings, 127 Nev. Adv. Op. No. 85 (December 29, 2011) – The Court grants a motion to strike respondents' appendix in a matter arising from a question certified from a federal court pursuant to NRAP 5 in the Fontainebleau casino resort project bankruptcy litigation, ruling that 1) respondents' appendix contains information beyond the facts certified to the Court by the bankruptcy court; 2) the Court's review is limited to the facts provided by the certifying court, and the Court must answer the questions of law posed based on those facts; and 3) while an appendix may be filed to assist the Court in understanding the matter, it may not be used to controvert the facts as stated in the certification order.

Fourth St. Place v. Travelers Indem. Co., 127 Nev. Adv. Op. No. 86 (December 29, 2011) – The Court affirms a district court summary judgment in an insurance coverage action, ruling that the policy at issue does not provide coverage because the damage sustained did not result from a covered cause of loss. The Court adopts the doctrine of efficient proximate cause, but concludes that it does not apply in this case: where covered and noncovered perils contribute to a loss, the peril that set in motion the chain of events leading to the loss or the 'predominating cause' is deemed the efficient proximate cause or legal cause of loss (citing Pioneer Chlor Alkali v. National Union Fire Ins. Co., 863 F.Supp. 1226, 1230-32 (D. Nev. 1994)).

Toston v. State, 127 Nev. Adv. Op. No. 87 (December 29, 2011) – The Court affirms in part and reverses in part a district court order denying a post-conviction petition for a writ of habeas corpus alleging ineffective assistance of counsel, ruling that 1) although trial counsel is not constitutionally required to inform a defendant of the right to appeal when the conviction stems from a guilty plea absent the defendant's inquiry about the right to appeal or the existence of a direct appeal claim that has a reasonable likelihood of success, trial counsel has a duty not to provide misinformation about the availability of a direct appeal; 2) counsel's affirmative misinformation about the right to appeal from a judgment of conviction based on a guilty plea may fall below an objective standard of reasonableness and therefore be deficient; 3) trial counsel has a duty to file an appeal when, based on the totality of the circumstances, the defendant reasonably demonstrated to counsel that he was interested in challenging his conviction or sentence; and 4) because Toston's petition alleged that trial counsel misinformed him regarding his right to appeal and that he had expressed dissatisfaction with the conviction and sentence such that counsel reasonably should have filed an appeal, and those allegations are not belied by the record and would entitle Toston to relief if true, the Court reverses the district court's

order as to this claim of ineffective assistance of counsel and remands for an evidentiary hearing (affirming the district court's order in all other respects).

Rogers v. State, 127 Nev. Adv. Op. No. 88 (December 29, 2011) –The Court affirms in part and reverses in part a district court order denying a post-conviction petition for a writ of habeas corpus in a case involving a conviction, pursuant to a guilty plea, of three counts of sexual assault and three counts of sexual assault with the use of a deadly weapon causing substantial bodily harm, offenses committed when appellant was a juvenile. The Court in pertinent part ruled that the district court abused its discretion in failing to appoint counsel to assist appellant in the post-conviction proceeding, given the severity of the consequences, appellants' indigency, and the difficulty of the issues presented related to the applicability and scope of the holding in Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011 (2010).