



The Public Lawyer

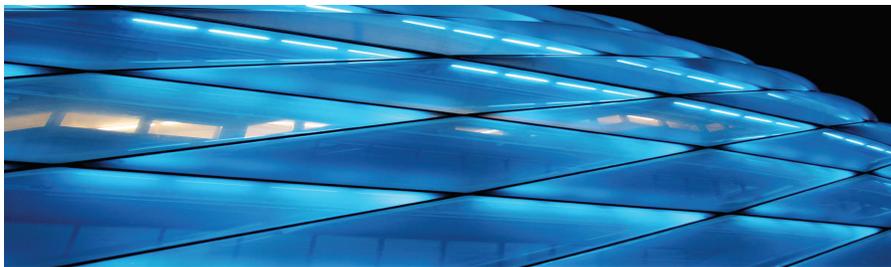
NEVADA SUPREME COURT CASES

D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 123 Nev. Adv. Op. No. 45 (October 11, 2007) “In this petition, we address the question of how district courts should determine the suffi-

ciency of a pre-litigation notice of constructional defects under NRS 40.645. The parties and amici curiae invite us to examine the reasonableness of a pre-litigation notice that triggers a

builder’s right to repair, or a claimant’s right to commence suit. Today, we provide district courts with a test and guidelines to measure the sufficiency of the pre-litigation notice.

(Continued on page 2)



Cost of Health Insurance For 2007 Premiums for family coverage increased 6.1% in 2007 per the Kaiser Family Foundation recent study. While premiums continue to rise, this is the fourth consecutive year that premium increases were less than they were in

the previous year. The average premium increase in 2007 is the lowest since 1999. While lower than in recent years, the 6.1% increase in the cost of coverage exceeds the overall rate of inflation by about three and a half percentage points and the in-

crease in workers’ earnings by almost two and a half percentage points. Since 2001, the cost of health insurance has increased 78%. The average cost of family coverage is \$12,106 a year.

For more information
<http://www.kff.org/insurance/7672/upload/EHBS>

Public Lawyers Section

October 16, 2007

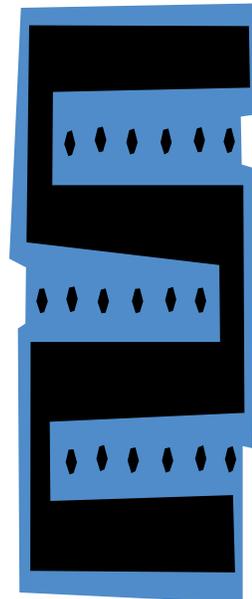
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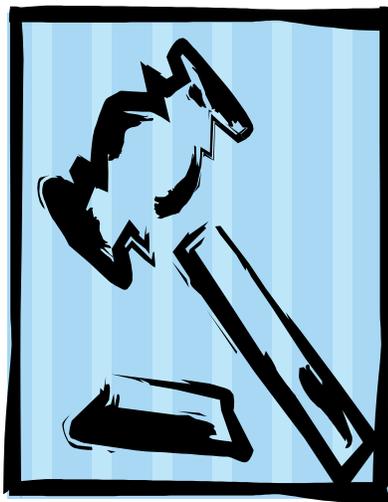


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Real party in interest First Light at Boulder Ranch Homeowners Association utilized a 'representative sample' of constructional defects in a small number of homes as a basis for giving notice of constructional defects common throughout a development of 414 residences. According to petitioners, First Light's extrapolated notice was inadequate because it failed to provide the 'reasonable detail' of defects and their location necessary to preserve for petitioners a meaningful opportunity to repair the alleged defects before suit is brought. We conclude that adequate extrapolated pre-litigation notice must have a reasonable statistical basis to describe the alleged defects and their locations in reasonable detail sufficient to afford contractors a meaningful opportunity to repair the alleged defects. Therefore, we articulate below a test to guide district courts in making written findings on whether a pre-litigation notice satisfies that threshold. So long as an extrapolated notice meets that requirement, district courts have wide discretion to determine the adequacy of a pre-litigation notice on a case-by-case basis.

Since we have adopted a test to be used by the district

courts, we grant this petition in part and direct the district court to reconsider the notice and make factual findings as discussed herein."



Butler v. Bayer, 123 Nev. Adv. Op. No. 44 (October 11, 2007) "In this appeal, we examine the duty of prison officials to protect incarcerated persons from attacks by other prisoners, and the duty of care owed by prison officials when releasing physically and mentally disabled inmates. We also examine the extent to which the Nevada Department of Corrections, as a state actor, is entitled to discretionary-act immunity in such matters under NRS 41.032(2).

With respect to the duty of prison officials to protect inmates from attacks by other inmates, we adopt the approach taken by the Restate-

ment (Second) of Torts, which defines the duty as one of reasonable care to prevent intentional harm or to avoid an unreasonable risk of harm, when such harm is foreseeable. Harm is foreseeable when prison officials actually know that an inmate is at risk, that the attacking inmate is dangerous, or when prison officials otherwise have reason to anticipate the attack. In this case, as the appellant never informed prison officials that he was afraid for his personal safety, and officials were not otherwise 'on notice' of an imminent attack, prison officials had no specific duty to protect the appellant from the unforeseeable attack that occurred. Consequently, summary judgment was appropriate on the appellant's claims related to the direct attack.

Regarding the duty of care when prison officials release disabled inmates, we conclude that general negligence standards apply, so that prison officials have a duty to exercise reasonable care to avoid foreseeable harm in releasing a disabled inmate. We further conclude that the action of releasing inmates does not require consideration of social, economic, or political policy, indicating that prison officials are not entitled to discretionary-act immunity for their ac-

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tions. Here, because the manner in which prison officials released the appellant, a disabled inmate, could lead a jury to reasonably find that some of appellant's injuries were a foreseeable result of the manner in which he was released, summary judgment on the appellant's claims related to his release was improper.

Martinez v. Maruszczak, 123 Nev. Adv. Op. No. 43 (October 11, 2007) "In this appeal, we consider the extent to which sovereign immunity protects publicly employed physicians from common-law liability for medical malpractice. Our analysis necessarily turns on Nevada's statutory waiver of sovereign immunity and a statutory exception to that waiver, which immunizes state actors from liability for actions grounded upon the state actor's exercise or performance of a discretionary function or duty. Because Nevada jurisprudence concerning the scope of the discretionary-function exception is unclear, and because Nevada's statutory language mirrors the Federal Tort Claims Act, we adopt the two-part federal test, as articulated in *Berkovitz v. United States* and *United States v. Gaubert* for determining when the discretionary-function exception to

the general waiver of governmental immunity applies. Under this two-part test, state-employed physicians enjoy immunity from medical malpractice liability only when their allegedly negligent acts involve elements of judgment or choice, and the judgment or choice made is of the kind that the discretionary-function ex-

"Because Nevada jurisprudence concerning the scope of the discretionary-function exception is unclear, and because Nevada's statutory language mirrors the Federal Tort Claims Act, we adopt the two-part federal test . . ."

ception was designed to shield, that is, a judgment or choice involving social, economic, or political policy considerations. If those two requisites for discretionary-function immunity are not satisfied, state-employed medical professionals are liable for malpractice to the extent of the statutory cap that applies to damages awards in tort actions against state employees."

"In applying the discretionary-function exception in various contexts, this court has created two separate tests that

cannot be reconciled. Initially, we adopted a planning-versus-operational test to determine whether discretionary-function immunity applied, based upon the stage of the government decision-making process at which the challenged decisions were made. Under this test, immunity was available to protect policy decisions, made at the planning level of a project or government endeavor; those decisions were viewed as purely discretionary. On the other hand, decisions made in the course of operating the project or endeavor were deemed non-discretionary and, thus, not immune under the discretionary-function exception, as those decisions were viewed as merely operational. In applying this test to the challenged acts or decisions, we acknowledged that "[t]he distinction between discretionary and operational functions is obscure."

Thereafter, when considering whether law enforcement officers were entitled to discretionary-function immunity for their decisions or acts, we applied a discretionary-versus-ministerial test. Under that test, an officer's decisions or acts were immune from liability so long as they were made

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using personal deliberation, decision, or judgment; in contrast, ministerial decisions, “amounting only to obedience to orders, or the performance of a duty in which the officer is left no choice of his own,” were not immune under NRS 41.032(2).

Given the different tests this court has used to determine whether NRS 41.032(2) immunity applies, and the resulting inconsistent conclusions based on who made the

decision or engaged in the act in question, we take this opportunity to clarify the test for evaluating claims of discretionary-function immunity under NRS 41.032(2). Because NRS 41.032(2) mirrors the Federal Tort Claims Act (FTCA), we turn to federal decisions to aid in formulating a workable test for analyzing claims of immunity under NRS 41.032(2).^[29]

The purpose of both the FTCA and Nevada’s waiver of sovereign immunity is ‘to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated.’ Consistent with this purpose, the United

States Supreme Court has determined that discretionary-act immunity under the FTCA necessarily protects only those decisions “grounded in social, economic, and political policy.” This approach is also taken by the majority of state

“ . . . if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch’s power or responsibility would be usurped, immunity will likely attach under the second criterion.”

courts utilizing the FTCA framework for waiver of immunity and comports with our strict construction of limitations on the state’s waiver of sovereign immunity.

In its most recent decision addressing the FTCA’s discretionary-function exception, the United States Supreme Court, in, clarified the scope of federal discretionary-act immunity. Drawing on its previous decision in *Berkovitz v. United States*, the Court set forth a two-part test. Under this test, referred to as the *Berkovitz-Gaubert* test, acts are entitled to discretionary-function immunity if they meet two criteria. Under the first criterion,

the acts alleged to be negligent must be discretionary, in that they involve an ‘element of judgment or choice.’ If the challenged conduct meets this first criterion because it involves an element of judgment or choice, the court must con-

sider the second criterion: “whether [the] judgment is of the kind that the discretionary-function exception was designed to shield.” The focus of the second criterion’s inquiry is not on the employee’s ‘subjective intent in exercising the dis-

cretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.’ Thus, the court need not determine that a government employee made a conscious decision regarding policy considerations in order to satisfy the test’s second criterion.

Given the interplay between the criteria of the *Berkovitz-Gaubert* test, certain acts, although discretionary, do not fall within the discretionary-function exception’s ambit because they involve ‘negligence unrelated to any plausible policy objectives.’ For example, a government employee who

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falls asleep while driving her car on official duty is not protected by the exception because her negligent judgment in falling asleep ‘cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.’ Because the FTCA’s discretionary-function exception is not a bright-line rule, federal courts applying the *Berkovitz-*

an action in tort.’ Thus, if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch’s power or responsibility would be usurped, immunity will likely attach under the second criterion.

the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy. In this, we clarify that decisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity, if the decisions re-



Gaubert test must assess cases on their facts, keeping in mind Congress’ purpose in enacting the exception: ‘to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of

This federal test is helpful in differentiating between true policy decisions protected by discretionary-act immunity and other unprotected acts. We therefore adopt the *Berkovitz-Gaubert* approach and clarify that to fall within

quire analysis of government policy concerns. However, discretionary decisions that fail to meet the second criterion of this test remain unprotected by NRS 41.032(2)’s discretionary-act immunity.”

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Ryan v. Eighth Judicial Dist. Court, 123 Nev. Adv. Op. No. 42 (October 11, 2007) “This is an original petition for a writ of mandamus challenging the district court’s order denying petitioner Kelly Ryan’s motion to substitute counsel. Kelly Ryan and her husband Craig Titus are accused of brutally murdering their roommate, stuffing her body in the trunk of their Jaguar, and setting the car on fire to cover up the alleged crimes.

Ryan seeks to have Michael Cristalli of Cristalli & Saggese represent her at trial. Cristalli’s partner, Marc Saggese, already represents codefendant Titus, raising the specter of dual representation and the accompanying potential for conflicts of interest at trial.

The primary issue raised in the petition is whether the district court manifestly or arbitrarily and capriciously abused its discretion when it refused to substitute in Michael Cristalli as Ryan’s counsel of choice. We grant Ryan’s petition and issue a writ directing the district court to canvass both defendants to determine whether they knowingly, intelligently, and voluntarily waive their right to conflict-free representation. In doing so, we conclude that a

court must honor a criminal defendant’s voluntary, knowing, and intelligent waiver of conflict-free representation so long as the conflicted representation will not interfere with the administration of justice. We also conclude that for a waiver of conflict-free representation to be effective, the defendant must also specifically waive the right to a mistrial as a result of her attorney’s potential or actual conflict of interest depriving her of her right to effective assistance of counsel arising from the dual representation. Finally, we conclude that before engaging in dual representation, the attorney must advise the criminal defendant of her right to consult with independent counsel to review the potential conflicts of interest posed by the dual representation. If the defendant chooses not to seek independent counsel, then the defendant must expressly waive her right to do so before the defendant’s waiver of conflict-free representation can be valid.”

Arnold v. Kip, 123 Nev. Adv. Op. No. 41 (October 11, 2007) “In this appeal, we consider whether a defendant must demonstrate prejudice in a motion to dismiss an action under NRC 16.1(e)(2) for the plaintiffs’ failure to timely file a case conference report. Al-

though suggests that the defendant must demonstrate prejudice as a result of the delay, we now clarify that a defendant who moves for dismissal because a plaintiff has failed to timely file a case conference report under NRC 16.1(e)(2) does not need to demonstrate prejudice and that the district court does not need to determine whether the defendant has suffered prejudice because of the delay. We further clarify our prior case law concerning whether arguments made in a motion for reconsideration may properly be considered on appeal from the final judgment, and we determine that these arguments are properly considered if the motion and order are part of the record on appeal. Because the district court in this case did not abuse its discretion in dismissing the action below, we affirm the district court’s order dismissing appellants’ action without prejudice.”

Leven v. Frey, 123 Nev. Adv. Op. No. 40 (October 11, 2007) “This proper person appeal presents us with an opportunity to clarify the proper procedure for judgment renewal under NRS 17.214 and to address whether judgment creditors are required to strictly comply with the statute’s requirements. We conclude that

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the statute requires the timely filing of an affidavit, timely recording of the affidavit (if the judgment to be renewed was recorded), and timely service of the affidavit to successfully renew a judgment and that these requirements must be complied with strictly. Since, in this case, respondents did not strictly comply with all of these requirements, the district court improperly denied appellant's motion to declare void the previous judgment, which had expired. We therefore reverse the district court's order and remand this matter to the district court.

Clark County School Dist. v. Richardson Constr. Co., 123 Nev. Adv. Op. No. 39 (October 4, 2007). "In this appeal, we consider whether appellant Clark County School District (CCSD) waived its right to assert the statutory damages limitation under NRS 41.035, which limits tort damages against a political subdivision to \$50,000, when it did not mention the statutory cap as an affirmative defense in its answer to respondent Richardson Construction, Inc.'s district court complaint.

We conclude that CCSD cannot waive its statutory damages protection, even though CCSD did not raise the statutory cap issue in its answer.

Therefore, under NRS 41.035, any tort damages awarded in this case against CCSD must be limited to \$50,000.

We also take this opportunity to consider the non-delineated defenses included in NRCP 8(c)'s 'catchall' provision for pleading affirmative defenses in an answer. Further, we consider whether the district court properly sanctioned CCSD during trial for discovery abuses by striking the affirmative defenses that CCSD had asserted in its answer. While the district court did not abuse its discretion in sanctioning CCSD by striking its affirmative defenses, the district court overbroadly applied the sanction to exclude evidence relating to Richardson's prima facie case that were not required to be affirmatively pleaded, which effectively resulted in the striking of CCSD's entire answer. Under NRCP 8(c), as we interpret the 'catchall' provision in that rule, non-delineated defenses must be affirmatively pleaded only if they raise new facts and arguments that would defeat the plaintiff's claims even if all allegations in the complaint were true. Since, under this interpretation of NRCP 8(c)'s 'catchall' provision, several of CCSD's pleaded affirmative defenses responded to Richardson's

prima facie case and were not true affirmative defenses, the district court erroneously precluded the jury from considering evidence offered to support those arguments. Accordingly, we reverse the district court's judgment and remand this matter for a new trial."

Witherow v. State, Bd. of Parole Comm'rs, 123 Nev. Adv. Op. No. 33 (September 20, 2007). "Because the Board's parole hearings are quasi-judicial proceedings that are not subject to the Open Meeting Law, we conclude that the Board need not comply with the requirements of NRS Chapter 241 when conducting parole hearings. Thus, the district court properly granted summary judgment on *Witherow*."

Witherow (Hardesty, J., dissenting) "By equating quasi-judicial proceedings with any proceeding that offers due process protections, the Stockmeier holding eviscerates the purpose of the Nevada Open Meeting Law. The Open Meeting Law exists to make certain that public bodies undertake actions and deliberations openly, because "all public bodies exist to aid in the conduct of the people's business." The Legislature defined 'public body' broadly to include nearly all governmental enti-

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ties other than the Legislature. This definition seeks to ensure public access to a variety of governmental proceedings where determinations affecting the public are made. However, pursuant to *Stockmeier*, any public body may implement modest due process protections to qualify as quasi-judicial and thereby exempt itself from the requirements of the Open Meeting Law.

By defining quasi-judicial proceedings as any that provide due process protections, the *Stockmeier* holding creates an absurd result by permitting public bodies to easily circumvent the Open Meeting Law. Entities such as the Public Utilities Commission, the Nevada Interscholastic Association, the Board of Architecture, the Board of Dental Examiners, county planning commissions, county boards of commissioners, the state Chiropractic Physicians' Board, and the state Board of Equalization are free to claim exemption from the Nevada Open Meeting Law simply upon the adoption or utilization of basic due process protections."

"The majority concludes that parole hearings are quasi-judicial because the Board performs a quasi-judicial function. The majority's holding is thus compatible with the well-

recognized judicial-function test adopted by many other jurisdictions. I believe that we should adopt this test and overrule *Stockmeier*, to the extent that it relies solely on the existence of minimum due process safeguards to determine whether an entity performs a quasi-judicial function."



Caballero v. Seventh Judicial Dist. Court, 123 Nev. Adv. Op. No. 34 (September 20, 2007). "In this petition, we address an important issue regarding access to justice—we consider whether a non-English speaking litigant is entitled to have a volunteer interpreter appointed to assist him or her in a justice court small claims proceeding. And, when no volunteer interpreter is available, we consider whether the justice court has discretion to appoint a state-registered interpreter, at public expense for indigent liti-

gants.

The underlying case arose after petitioner, an inmate, was allegedly deprived of certain personal property by Nevada state prison employees. Petitioner filed suit in the small claims court, seeking the return of his property. At a hearing on his action, petitioner, who does not speak or understand English, asked the justice court to appoint an interpreter. The justice court concluded that it lacked authority to appoint an interpreter and dismissed the action. The district court affirmed the dismissal on appeal. Petitioner then filed an original proper person writ petition in this court.

We conclude that under both its inherent and express powers, a justice court is authorized to allow a volunteer interpreter, and when a volunteer interpreter is not available, to appoint a state-registered interpreter and to determine any compensation. Because the district court erroneously concluded that the justice court lacked authority to appoint an interpreter in the underlying small claims proceeding and did not address the justice court's failure to determine if a volunteer interpreter was available, we grant this petition."

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Nay v. State, 123 Nev. Adv. Op. No. 35 (September 20, 2007). “The primary issue in this appeal is whether a defendant may be found guilty of first-degree felony murder if the intent to commit the predicate enumerated felony arises after the conduct resulting in death. We answer that question in the negative and adopt the majority position that for purposes of the first-degree felony-murder statute, the intent to commit the predicate enumerated felony must have arisen before or during the conduct resulting in death. In this case, the district court erred in refusing to so instruct the jury, as the defense had requested. Under the circumstances presented, the error cannot be considered harmless with respect to the first-degree murder conviction. We therefore reverse the judgment as to that conviction. We affirm the conviction for robbery with the use of a deadly weapon.”

Clark County Dist. Att’y v. Eighth Judicial Dist. Court, 123 Nev. Adv. Op. No. 36 (September 20, 2007). “In the proceedings underlying this petition, a child was placed in adoptive foster care during the same month that the child’s relatives came forward and requested that the child be placed with them. Al-

most one year later, and after the foster parents expressed an interest in adopting the child, the child’s relatives filed a motion for the child’s immediate placement with them. Subsequently, the district court ordered the child placed with the relatives.

In this original proceeding, we consider whether the district court misapplied our recent holding in *Matter of Guardianship of N.S.* in two ways: (1) determining that the child’s best-interest standard gives way to a decision on whether certain legislative goals are met; and (2) concluding that to overcome the statutory familial preference, the Department of Family Services or the foster parents were required to show that the relatives were unsuitable or that placement with them would be detrimental to the child. Although the district court must, in determining whether a familial preference exists, examine the statutory requirements of relatedness and suitability, the district court’s primary focus should remain on the child’s best interest. Consequently, any unsuitability or detriment standard should not have played a role in the district court’s analysis; instead, after determining that the familial preference applies, a district court must, within its

discretion, further determine whether placement with family members, over a suitable foster family, is in the child’s best interest. Because the district court failed to apply the appropriate standard, we grant this petition.”

Westpark Owners’ Ass’n v. Eighth Judicial Dist. Court, 123 Nev. Adv. Op. No. 37 (September 20, 2007). “Because title to the 108 condominium units constructed by Westpark transferred to individual purchasers at the time of sale, the units in question here were “residences” for the purposes of NRS Chapter 40. However, as the units were occupied on a rental basis for seven years before sale, we conclude that the units were not “new” under NRS 40.615. Therefore, the remedies of NRS Chapter 40 only apply to the Association’s claims if Westpark altered or repaired the units prior to sale and the defects are related to those alterations or repairs.”

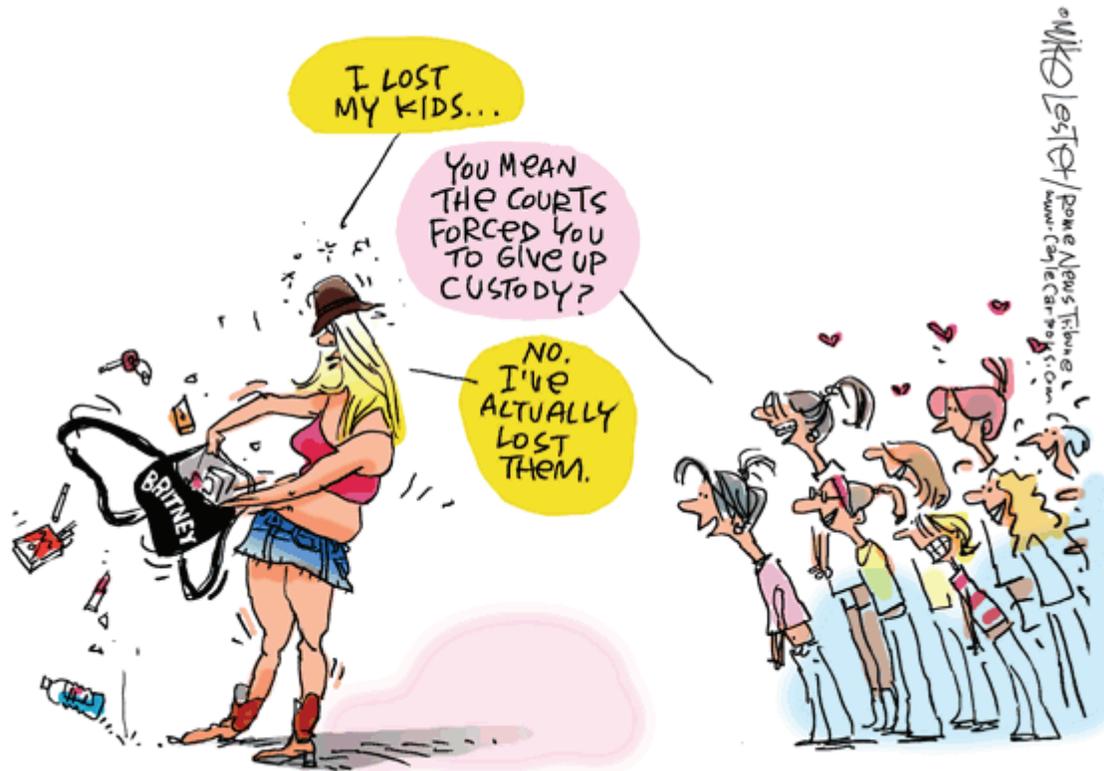
Nanopierce Technolgies, Inc. v. Depository Trust and Clearing Corp., 123 Nev. Adv. Op. No. 38 (September 20, 2007). “The question presented is whether section 17A of the Securities Exchange Act of 1934 preempts appellants’ state law claims for damages. We agree with the district

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court that appellants' state law challenges related to the Stock Borrow Program are

17A of the Securities Exchange Act preempts appellants' claims."

co-worker, according to the findings of *Workplace Taboos*, a new CareerBuilder.com sur-



preempted by federal statutes and regulations. Specifically, we conclude that, because the state law on which appellants base their claims poses an obstacle to respondents' accomplishment of congressional objectives as explicitly stated in and gleaned from the Securities Exchange Act's framework, and because respondents' compliance with both state and federal requirements concerning the securities transactions at issue in this case is impossible, section

Sleeping On the Job Is a Taboo Many Break-SHRM

U.S. workers apparently are more sleep-deprived and amorous than they are likely to take credit for someone else's work, according to a survey of more than 5,700 U.S. workers. Forty-five percent admit to falling asleep at work, and 39 percent say they have kissed a

vey that Harris Interactive conducted with 5,727 full-time workers age 18 and older in June 2007.

Among other findings:

- 22 percent have stolen from the workplace.
- 22 percent have spread a rumor about a co-worker.
- 21 percent have consumed alcohol while on the job.
- 18 percent have snooped in the workplace after hours.
- 4 percent have lied about

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their academic background.

- 2 percent have taken credit for someone else's work.

More men than women reported that they have committed all these workplace taboos, according to the findings. Nearly half, or 49 percent, of men have fallen asleep on the job, vs. 35 percent of women who admit having done so. And 44 percent of men vs. 34 percent of women say they've smooched a co-worker.

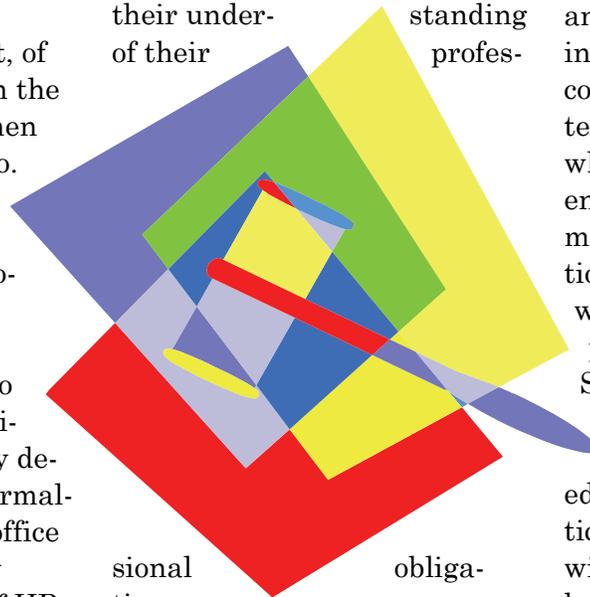
"As companies continue to embrace more casual environments, employees may develop a false sense of informality when it comes to the office behavior," said Rosemary Haefner, vice president of HR at CareerBuilder.com.

"Employees should make sure they are aware of company policies, so something that initially seems harmless doesn't end up negatively impacting a career," she said in a press release.

Why do Government administrators accept lawyers as experts?

This study, by researchers at

the University of Oxford, examined the knowledge and skills used by these lawyers in their work; the extent to which administrators regard them as experts, their involvement in policy making, and their understanding of their profes-



sional obligations.

obligations.

Key Findings

'Quality' lawyering

Government lawyers use a body of knowledge and skills much like others of their profession. However, they also offer 'quality' lawyering, often involving the ability to see a situation in a wider context or as part of a pattern. And they are able to work at great speed.

They differ from private prac-

tice lawyers in their knowledge of public law and legislative proceedings, as well as of the position of the Crown, some esoteric doctrines and fundamental statutes. They can create new powers and concepts, and have to bear in mind a far wider range of considerations, including potential reactions of all those who may be affected by different measures and the Government's wider policies. In addition, they must work with a wide range of officials and politicians in Whitehall. Some administrators have built up comprehensive, sometimes deep, knowledge of the law in their particular areas. But they share with lawyers the idea that law has a structure, that provisions have to 'fit in with each other' or might impact on other legislation.

So even they look to lawyers for a knowledge of other legal situations and cases which might be helpful in their own area of responsibility. Surprisingly, questions of meaning and interpretation were also generally seen as being for lawyers.

Many lawyers were trained at the Civil Service College or elsewhere but, on the whole, spoke of learning by doing, with the help of line managers and others. Courses were helpful, but not like reality. To

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some extent, it was an apprenticeship system writ large. Comparisons with in-house lawyers in US corporations show that both groups leave others to decide on legal risk, so long as there is a respectable legal argument for the position taken. But while the managers in the US could control the style of lawyering in their company, particularly by selecting the lawyers used, the selection and careers of Government lawyers in the UK was mainly within the Government Legal Service. Government lawyers mostly took the initiative in relations between them and administrators, even at the highest level. The way Government lawyers operate on a network basis is very different from the normal notion of lawyer-client relationships. And matters which some of the lawyers treat as an ethical issue, requiring them to refuse to act, others deal with by persuasion.

About the study

The study was led by Philip Lewis, of the Oxford University Centre for Socio-Legal Studies. Researchers interviewed 50 lawyers in four Government departments as well as others in the Treasury Solicitor's Department ("TSD"). They also interviewed 21 administrators, all but two from the same departments or

those advised by TSD. Nine others were also interviewed, including former Permanent Secretaries and Law Officers.

Arizona – 9th Circuit Upholds Chandler Police Officer Fired In Sex-Site Case

By Howard Fischer
Capitol Media Services

A Chandler police officer involved in what judges called a "sleazy," "vulgar" and "indecent" sexually explicit Web site is not entitled to get his job back, a federal appeals court ruled. The 9th U.S. Circuit Court of Appeals rejected arguments by Ronald Dible that the First Amendment protected his right to operate the Web site, which featured photographs and videos of his wife, Megan, engaged in various sex acts.

The judges said Dible was running the Web site not to express a point of view but simply to raise money. And even if there are constitutional considerations, government agencies can subject their employees to some restrictions that would otherwise be unconstitutional if applied to everyone else, the judges said. Judge Ferdinand Fernandez,

writing for the majority, said that tracks with the need for police departments to maintain "an effective and strong operation." "It would not seem to require an astute moral philosopher or brilliant social scientist to discern the fact that Ronald Dible's activities, when known to the public, would be detrimental to the mission and functions of the employer," he wrote. "The public expects (police) officers to behave with a high level of propriety and, unsurprisingly, is outraged when they do not do so," Fernandez continued. "The law, and their own safety, demands that they be given a degree of respect, and the sleazy activities of Ronald and Megan Dible could not help undermining that respect."

Wednesday's ruling was not unanimous. Judge William Canby Jr. said Dible's activities are constitutionally protected because he never identified himself on the Web site as a Chandler police officer. "Vigorous enforcement of the free-speech guarantee of the First Amendment often requires that we protect speech that many, even a majority, find offensive," he wrote. And he said what was on Dible's Web site, although pornographic, did not rise to the level of being obscene and

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therefore illegal. But Canby sided with the majority in refusing to order Dible reinstated. The judge said even if he could not be fired for his Web site, he certainly could be fired for lying to superiors about his connection to the operation. Court records show the Dibles began running the Web site in 2000. It featured Megan Dible, who was working under a pseudonym, engaged in various sexual poses and activities. One of the photographs showed Ronald Dible.

“The Dibles did not intend to express any kind of message or engage in social or political Fernandez said. “They participated in those activities to make money; it was as simple as that.”

The couple also marketed their Web site and a CD through live appearances at various bars in the area. His activities eventually came to the attention of his department, which opened an investigation. Dible eventually was fired for violating regulations prohibiting activities that bring discredit to the department, as well as for lying during the inquiry. Fernandez said Dible’s activities were not designed to inform the public about the operations of the Police Department. And he

said they were not private comments, which courts have said are protected, even by government workers. “His activities were simply vulgar and indecent,” the judge wrote. “They did not contribute speech on a matter of public concern.”

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Bockting v. Bayer, No. 02-15866 (October 12, 2007) “Bockting appeals from the district court’s order denying his petition for a writ of habeas corpus. Bockting challenges his state convictions on charges associated with the alleged sexual abuse of his then-six-year-old step daughter. We have jurisdiction under 28 U.S.C. § 2253(a). Bockting has not demonstrated the state court’s adjudication on the merits: ‘(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings,’ 28 U.S.C. § 2254(d). Therefore, we affirm the district court’s order denying his

petition for writ of habeas corpus.

United States v. Richard, No. 06-10377 (October 12, 2007) “Jacquan Richard (“Richard”) appeals his jury conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). We have jurisdiction under 28 U.S.C. § 1291, and—because we conclude the district court abused its discretion by permitting the jury to rehear only a portion of a key witness’s testimony without taking necessary precautions to ensure the jury did not unduly emphasize the testimony—we vacate Richard’s conviction and remand.

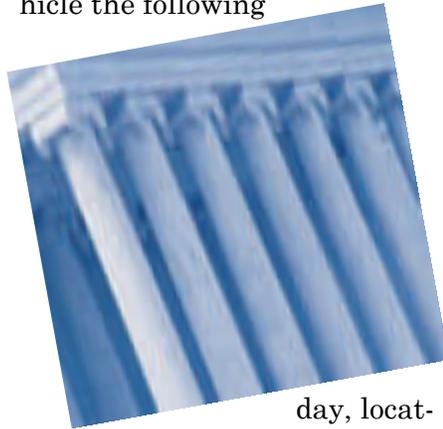
Richard was a backseat passenger in a vehicle lawfully stopped by Las Vegas Police Officer Mark Prager for displaying defective registration tags. Officer Prager requested identification from the vehicle’s four occupants and was able to accurately identify three: (1) the vehicle’s owner and driver, David Martin; (2) backseat passenger Michael Schneider; and (3) front seat passenger Nikole Reeder. Officer Prager was unable to immediately identify Richard because Richard did not have physical identification and the information he provided to Officer Prager could not be con-

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firmed via a local, national, and Department of Motor Vehicles record check. After issuing two vehicle citations to Martin, Officer Prager released him, along with Reeder and Schneider, permitting them to enter an adjacent casino, but detained Richard in order to ascertain his identity. While detained, Richard volunteered that Martin was a pimp who was pandering Reeder, prompting Officer Prager to request vice backup assistance.

Although not fully developed in the record, it appears that support officers subsequently retrieved Martin, Reeder, and Schneider from the casino for questioning. During this follow-up questioning, Schneider informed Detective Aaron Stanton that there was a gun in Martin's vehicle near the area where Richard had been seated. Detective Stanton later learned that the gun allegedly belonged to Richard, though it is unclear from the record how he obtained this information. Richard, Martin, and Reeder were then arrested on charges unrelated to the original traffic stop, Schneider was let go, and Martin's vehicle was impounded. No gun was discovered during a routine impound inventory search. However,

Schneider later provided the police with additional information concerning the gun, stating that it was located *inside* the rear seat of Martin's vehicle. Schneider then accompanied Detective Stanton to the impound lot, where he pointed to the gun's location, evidenced by a small bulge in the backseat. Based on this information, Detective Stanton obtained a search warrant and searched the vehicle the following



day, locating the gun inside the rear passenger seat. Detective Stanton subsequently interviewed Richard at the Clark County Detention Center.

During this interview, Richard repeatedly denied ownership or possession of the gun, but acknowledged that he may have previously touched or held it. At trial, Reeder was the only witness to testify to actually seeing the gun in Richard's possession. At the outset of her testimony, Reeder described Officer

Prager's stop of Martin's vehicle, acknowledged that Martin was her boyfriend at the time, and described her location and that of the other passengers in Martin's vehicle. When asked, however, Reeder had significant, ongoing difficulty identifying Richard in the courtroom as a passenger in Martin's vehicle. She failed to do so on four successive attempts over the course of several minutes, despite being prompted with a photograph of Richard she had previously identified as the backseat passenger who possessed the gun and specifically directed to look at the defense table. On the fifth attempt, after additional prompting and direction, Reeder finally acknowledged that Richard looked like the passenger in Martin's vehicle, explaining that he had apparently gained weight and changed his hairstyle. Reeder then testified that when Officer Prager activated his lights to stop Martin's vehicle, Richard exclaimed that 'he had to run, he had warrants, and a gun' and that she saw him pull a gun from his pants and place it under or around the backseat. On cross-examination, defense counsel questioned Reeder about the relatively brief period of time she observed the gun and her ability to describe the gun in detail. In addition, defense counsel inquired fur-

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ther into Reeder's relationship with Martin, the relationships (or lack thereof) between the vehicle's other occupants, and Schneider's state of inebriation at the time of the stop.

In the course of its deliberations, the jury made several requests, including to 'have Nikole Reeder's testimony and cross-examination.' In response, the judge explained that there was no then-available transcript of the testimony and advised the jury: 'If you want to hear a read-back of somebody's testimony you have to let us know what part you want to hear, and then I'll have the court reporter find that in her notes, and then we will bring you back into court and read that back to you.' The court also noted that there was an audiotape, but informed the jury that it would take some time to cue up. The jury was advised to 'let [the court] know what portion' of testimony it wanted to hear and temporarily excused. Upon its return, the jury stated that it 'would like to either hear back the tape or have read . . . Ms. Reeder's testimony from after the side bar until right after — or right toward the beginning of cross-examination. . . . [R]ight around the time she was being asked to identify the defendant.'

Outside the jury's presence, and after having learned for the first time of the jury's intended focus on Reeder's testimony in support of the government's case, Richard objected to playing only a portion of Reeder's testimony and moved to have her testimony replayed in its entirety. The judge denied the motion as untimely, expressing concern that reversing course at that point and requiring the jury to hear all of Reeder's testimony would make him 'look like an idiot.' He also rejected Richard's argument that, because Reeder's credibility was at issue, it was important for the jury to hear her entire testimony, and stated that he would also overrule the objection on the merits because it was not his 'place' to instruct the jury that it was required to hear 'the entire testimony of everybody, or of Ms. Reeder, or anyone else.'

Tollis, Inc. v. County of San Diego, No. 05-56300 (October 10, 2007) "In June 2002, the San Diego County Board of Supervisors adopted a comprehensive zoning ordinance to govern the operation of adult entertainment businesses within its jurisdiction, which covers the unincorporated portions of the county. The ordinance re-

stricts the hours in which such businesses can operate, requires the removal of doors on peep show booths, and mandates that the businesses disperse to industrial areas of the county. The County's purported rationale for the ordinance was to combat negative secondary effects — crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior — that concentrate in and around adult businesses. The two adult entertainment establishments presently operating in the unincorporated portions of San Diego County filed suit. In this appeal, the operators of one of the establishments, *Déjà Vu*, appeal the district court's decision to uphold the ordinance's dispersal requirements. They also appeal the district court's dismissal of their state law claim under California Government Code § 65860, which requires zoning laws to conform to the municipality's general plan, and the district court's decision to sever a provision of the ordinance setting forth the amount of time in which the County had to approve an operating permit for adult establishments.

We hold that the district court's manner of severance was in error and reverse on

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that ground. We affirm in all other respects.”

“A severance is inappropriate if the remainder of the statute would still be unconstitutional. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 935 (9th Cir. 2004). This conclusion does not require, as *Déjà Vu* contends, invalidation of the entire ordinance. The district court should have instead severed all provisions of § 6930(b) setting forth the permit requirement because they were not moored to a reasonable time limit, thereby leaving the ordinance’s other provisions intact. Owners of adult establishments would have to comply with the substantive provisions of the ordinance, but would not need to secure a permit prior to operation unless and until the time limit defect is corrected. We therefore remand to the district court to correct its severance order consistent with this opinion. Each party should bear its own costs.”

Parle v. Runnels, No. 06-16780 (October 10, 2007)
 “Domestic violence is a serious problem in America. When love turns to hate, grave injury—even death—can result. When that violence spins out of control, considerable problems confront the criminal jus-

tice system. The heat of the moment and the history of the relationship can make it quite difficult to assess responsibility. Sometimes it is clear who the aggressor is or has been; sometimes it is not so clear. The trial at issue here required a California jury to make just such a difficult determination. Because we conclude, as did the district court, that multiple errors in the admission and exclusion of evidence accumulated to deprive



Timothy Charles Parle of a constitutionally fair trial, and that the one-sided prejudice caused by these errors made the state court’s contrary conclusion objectively unreasonable, we affirm the grant of habeas relief.”

“Because all of the trial court’s errors pertained to evidence relevant to the *only* issue before the jury—Parle’s state of mind at the time of the

crime—and all of the improperly admitted evidence bolstered the State’s case, while all of the erroneously excluded evidence rendered Parle’s defense far less persuasive than it might have been, it was objectively unreasonable for the California Court of Appeal to conclude that the combined effect of these errors did not violate Parle’s due process rights. That the evidence in question may have been partially cumulative of other properly admitted evidence does not render the errors necessarily harmless because the State’s case establishing Parle’s premeditation was less than overwhelming, and the jury’s verdict is therefore more likely to have been affected by the trial court’s errors.”

Pocatello Educ. Ass’n v. Heideman, No. 06-350 (October 5, 2007) “Plaintiff labor organizations sued officials of the State of Idaho, claiming that the Voluntary Contributions Act, Idaho Code §§ 44-2004(2) and -2601 to -2605, violated Plaintiffs’ constitutional rights under the First Amendment as well as other constitutional provisions. Before the district court, the State officials conceded that all challenged provisions were unconstitutional, except Idaho Code § 44-2004(2),

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which prohibits any payroll deductions for ‘political activities.’ The district court held the ban on payroll deductions to be constitutional as applied to the state government itself, but unconstitutional as applied to private and local government employers. The State officials contend on appeal that the payroll deduction ban may be constitutionally applied to local government employers. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that Idaho Code § 44-2004(2), as applied to local government employers, violates the First Amendment because it is a content-based law for which the State officials assert no compelling justification. Moreover, the State officials have not demonstrated that the law should be reviewed under the more relaxed standard applicable to speech restrictions in nonpublic fora. In particular, they have not shown that the State of Idaho may properly assert a proprietary interest in controlling access to the payroll systems that constitute the fora in this case. Caselaw suggests that the authority over local governments the State possesses by operation of law is not enough to associate the local workplaces or payroll deduction programs with the

State of Idaho, and the State officials have adduced no specific evidence that the State actually does own, administer, or control the payroll deduction programs.

United States v. Brock-Davis, No. 06-30565 (October 2, 2007). “This case is an appeal by Rose Brock-Davis (“Brock-Davis”) of an order of restitution to cover, among other things, testing and cleanup costs for a motel room she occupied during the course of a conspiracy to manufacture methamphetamine. Restitution was imposed pursuant to the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A. The parties agree that this statute applies and we accept their agreement that it applies. We address in turn Brock-Davis’ multiple contentions.

Brock-Davis contends, first, that there was no statutory authorization for the restitution imposed, because the MVRA does not authorize remediation costs for a motel room. Second, she argues that the motel was not a ‘victim’ of her offense as defined by the MVRA. Third, she contends that there was an intervening cause of the loss to the motel that prevents her from being liable for restitution. Fourth,

she urges that inconsistencies in the amounts requested invalidate them. Fifth, she argues that she should not have been liable for lost income. Finally, she contends that she should not have been held liable for costs related to asbestos testing performed at the motel because these costs were not directly related to her offense of conviction. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm in part and vacate in part and remand.

In sum, Brock-Davis’ first four contentions are unpersuasive but, as to the fifth and sixth issues, we conclude that the district court erred when it awarded restitution for the motel’s lost income from the motel room and when it required restitution for the total amount of the unsegregated bill, which included asbestos-related costs. Accordingly, the restitution order will be vacated and remanded as to the issues of lost income and asbestos-related costs.”

United States v. Lujan, No. 02-30237 (October 2, 2007). “Lisa Renee Lujan appeals from the district court’s order authorizing the probation office to demand the collection of a blood sample as a condition of her supervised release, as

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mandated by the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §§ 14135-14135e. She alleges that the Act violates the Fourth Amendment and the Ex Post Facto Clause, that it is an unconstitutional bill of attainder, and that it contravenes separation of powers. We reject these constitutional challenges and affirm.”

John v. Youngquist, No. 05-56125 (September 26, 2007). “This appeal challenges a district court’s denial of summary judgment dismissing a damage suit by a female school teacher against a police officer for improperly arresting her for allegedly sexually molesting a ten-year-old female student. The district court held that the officer did not have probable cause for the arrest and was not entitled to qualified immunity for his conduct. We hold, however, that the officer had probable cause for the arrest and therefore reverse the denial of summary judgment.”

“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe an offense has been or is being committed by the person being arrested.’ *United States v. Lopez*,

482 F.3d 1067, 1072 (9th Cir. 2007) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). This court looks to ‘the totality of the circumstances known to the arresting officers, [to determine if] a prudent person would have concluded there was a fair probability that [the defendant] had committed a crime.’ *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986). Probable cause is an objective standard and the officer’s subjective intention in exercising his discretion to arrest is immaterial in judging whether his actions were reasonable for Fourth Amendment purposes. *Lopez*, 482 F.3d at 1072.

The determination whether there was probable cause is based upon the information the officer had at the time of making the arrest. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (“Whether probable cause exists depends on the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest”). It is essential to avoid hindsight analysis, *i.e.*, to consider additional facts that became known only after the arrest was made.”

Cornejo v. County of San Diego, No. 05-56202 (September 24, 2007). “This appeal requires us to resolve

an issue left open in our en banc decision in *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884 (9th Cir. 2000): whether Article 36 of the Vienna Convention on Consular Relations creates judicially enforceable rights that may be vindicated in an action brought under 42 U.S.C. § 1983. Ezequiel Nunez Cornejo’s complaint seeks damages and injunctive relief against the County of San Diego, several deputy sheriffs, and various cities within the county on behalf of a class of foreign nationals who were arrested and detained without being advised of their right to have a consular officer notified as required by Article 36. The district court dismissed the action, concluding that Cornejo could not bring a § 1983 claim for violation of the Convention because it creates no private rights of action or corresponding remedies. We agree with the district court that Article 36 does not create judicially enforceable rights. Article 36 confers legal rights and obligations on *States* in order to facilitate and promote consular functions. Consular functions include protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, de-

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tained foreign nationals benefit from Article 36's provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through § 1983. Accordingly, we affirm."

Kay v. City of Palos Verde, No. 05-56149 (September 21, 2007). "James A. Kay, Jr. wanted to use the pre-existing amateur antennae on the roof of a house in the City of Rancho Palos Verdes for commercial wireless transmissions. The City denied him a conditional use permit, and Kay filed suit. The district court dismissed three of his claims, but ruled in his favor on his Telecommunications Act and California state law claims. Although the district court granted injunctive relief, it found that the City enjoys immunity from damages, and denied Kay's request for compensatory damages. Kay appeals the dismissal of three of his claims, the denial of damages, and seeks reassignment to a different judge on remand. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the dismissed claims are now barred by the doctrine of *res judicata*, and that the City is immune from damages under

controlling California law. Finally, we hold that compensatory damages are not available under the TCA, 47 U.S.C. § 332, and affirm the district court."

Redding v. Sanford Unified School Dist. No. 1, No. 05-15 (September 21, 2007).

"Plaintiff- Appellant Savana Redding, a minor, by her mother and legal guardian, appeals from the district court's order entering summary judgment in favor of Defendants Kerry Wilson, Helen Romero, Peggy Schwallier, and the Safford Unified School District, in this 42 U.S.C. § 1983 action for monetary damages. Redding alleges that Defendants violated her Fourth Amendment rights by conducting a warrantless search of her person during school hours and on school premises. Because we conclude that Defendants did not violate Redding's Fourth Amendment rights, we affirm the district court's order."

Blanchard v. Morton School Dist., No. 06-35388 (September 20, 2007). "We have held that money damages are not available under the IDEA for the pain and suffering of a disabled child. *Witte ex rel. Witte v. Clark County Sch. Dist.*, 197 F.3d

1271, 1275 (9th Cir. 1999). The question before us now is whether 42 U.S.C. § 1983 creates a cause of action for money damages under the IDEA for the lost earnings and suffering of a parent pursuing IDEA relief. We hold that it does not. We affirm the district court's judgment in favor of the school district after taking into account the intervening Supreme Court decision in *Winkelman*."

Brown v. Ornoski, No. 05-99008 (September 19, 2007). "Petitioner Albert Greenwood Brown, Jr. was convicted in California and sentenced to death for the rape and murder of a fifteen-year-old girl. The district court denied his petition for a writ of habeas corpus, but granted a certificate of appealability on two claims that Brown received ineffective assistance of counsel in the sentencing phase of his trial. We expanded the COA to include two additional claims, one also involving penalty phase ineffective assistance of counsel, and another involving Brown's claim that lethal injection violates the Eighth Amendment. We affirm the district court's denial of the writ."

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