

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

*Waldman v. Maini* No. 48144 (November 6, 2008) “On Christmas Day 2003, Steven and Susan Maini, their two children, and Susan’s parents died in a plane crash at the North Las Vegas airport. This appeal arises out of a conflict between Susan’s brother and Steven’s brother, the administrators of Susan’s and Steven’s respective estates, over the distribution of the ownership interest in a Maini family company, respondent/cross-appellant Maini Distributing, Inc. (MDI), and the distribution of Susan’s life insurance policies’ proceeds. In this appeal, after determining that MDI was Steven’s separate property, we consider two issues of first impression in the context of determining the appropriate distribution of Susan’s life insurance proceeds.

First, we consider whether a corporation may acquire an ownership interest in life insurance policies by paying the premiums. Although we conclude that a corporation may acquire such an interest under constructive trust and resulting trust principles, the

facts in this case do not warrant the application of those doctrines. In so concluding, we also note that under the resulting trust doctrine a company acquiring equitable ownership of a life insurance policy must show that it has an insurable interest in the life of the insured to recover the proceeds. In this case, MDI made no such showing.

Second, we consider the application of the Uniform Simultaneous Death Act. We determine that, in the case of simultaneous death, the Uniform Act applies to the distribution of property when a decedent’s will or life insurance policy provides for a property distribution that is the same as that provided for by the Uniform Act. When the Uniform Act applies, it creates a statutory presumption that an insured survived his or her simultaneously deceased beneficiaries. This presumption controls the distribution of life insurance proceeds through the distribution of the insured’s estate even though the policy may

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We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. Having considered the petitions and answers thereto in light of this standard, we conclude that rehearing is not warranted, and therefore, we deny the petitions for rehearing. Nevertheless, as petitioners have pointed out, a portion of our June 12, 2008, opinion could be misconstrued as being contrary to this court's precedent. Accordingly, although we deny rehearing, we withdraw our June 12, 2008, opinion and issue this opinion in its place.

In this opinion, we reach the same conclusions as in our prior opinion, but we clarify our reasoning for reversing the district court's judgment on the breach of contract claim regarding the retrofit issue and for remanding that matter to the district court for a new trial.

In the district court, respondent Bullock Insulation, Inc. (Bullock Insulation), filed complaints against appellants Lehrer McGovern Bovis, Inc. (Bovis), and Venetian Casino Resort, LLC (Venetian Resort), for, among other claims, breach of contract and to foreclose on a mechanic's lien. The parties disputed, among other things, whether, by the terms of the sub-contract between Bullock Insulation and Bovis, Bovis was required to pay Bullock Insulation to retrofit walls with fire retardant materials. After considering the jury's answers to special interrogatories and its general verdict, the district court entered judgment in favor of Bullock Insulation. The district court later entered an order granting Bullock Insulation's motion for

attorney fees and sanctioning Bovis for bad-faith litigation practices. These appeals followed.

In these appeals, we consider the primary issue of whether a new trial is required when the district court creates special interrogatories upon issues of fact and the jury's answers to those interrogatories are inconsistent, such that an ultimate judgment cannot be entered without contradicting a portion of the answers and the general verdict. While this court has held that parties have a duty to object to inconsistent jury verdicts before the jury is discharged, we conclude that this general rule is not absolute because, under NRC 49(b), the district court is obligated not to enter a judgment when the answers to interrogatories are inconsistent with each other and one or more answers are also inconsistent with the general verdict. In this case, we conclude that a new trial is warranted regarding the breach of contract claim related to the retrofit issue, even though the parties failed to object to the verdicts as inconsistent prior to discharge of the jury, because the ultimate judgment cannot be reconciled by an interpretation of the special verdicts and the general verdict in their totality. Therefore, because NRC 49(b) mandates that a judgment shall not be entered when such inconsistencies exist, we conclude that the district court abused its discretion when it entered the inconsistent judgment.

We also consider the enforceability of a mechanic's lien waiver provision entered into before the Legislature amended NRS Chapter 108 to require specific forms for lien waivers, and whether a pay-if-paid provision entered into before the Legislature amended NRS Chapter 624 to include provisions for prompt payment is unenforceable as a matter of public policy. Additionally, we consider whether the district court abused its discretion when it sanctioned Bovis for maintaining

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its defense in bad faith.

We conclude that the district court properly determined that the lien waiver and pay-if-paid provisions were unenforceable based upon Nevada's public policy favoring the statutory right to a mechanic's lien. Additionally, the district court abused its discretion when it sanctioned Bovis for bad-faith litigation practices.

Accordingly, we reverse the judgment on the jury verdict as it concerns the breach of contract claims related to the retrofit issue, based on the inconsistent answers to the special interrogatories, and remand this matter to the district court for further proceedings consistent with this opinion. We affirm the remaining portion of the district court's judgment regarding the lien waiver provision, the pay-if-paid provision, and the principal owed, plus interest. Finally, in light of our decision that a new trial is warranted on the breach of contract claim concerning the retrofit work, we necessarily vacate the portion of the district court's order awarding attorney fees and reverse the portion of its order awarding sanctions."

*Megastate v. City of Fernley* No. 50994 (October 30, 2008) "Appellants, David and Sandra Mathewson, Jack and Mary Knowles, and Shirley Fraser—all of whom own property along Mesa Drive—and the Mesagate Homeowners' Association (collectively 'Mesagate') petitioned the district court for a writ of mandamus revoking respondent City of Fernley's building permit for a water treatment plant. The district court denied Mesagate's writ petition, concluding that Mesagate's alleged harm did not support extraordinary writ relief. Mesagate now appeals the order denying its writ petition.

On appeal, the City contends that, although the district court correctly denied Mesagate's writ petition, the district court should have based its decision on Mesagate's lack of a legally recognized interest in having the building permit revoked and its failure to exhaust its administrative remedies. Although we believe that the Mesagate property owners have a legally recognized interest in this case, we agree with the City that Mesagate failed to exhaust its administrative remedies.

Under NRS 278.0235, parties are permitted to challenge in district court 'any final action, decision or order of any governing body, commission or board.' In our view, the approval of the building permit at issue in this case did not constitute a 'final action, decision or order' when considered in light of a second provision, NRS 278.3195.

NRS 278.3195(1) requires a governing body to adopt an ordinance providing any person who is aggrieved by an administrative land use decision the right to appeal that decision to the governing body. The City has complied with that mandate by establishing provisions set forth in the Fernley Development Code that create and provide for an administrative appeal to the Board of Appeals, comprised of governing body appointees. Once the governing body's review has been completed, NRS 278.3195(4) provides for a process of judicial review.

Applying those provisions to this case, we conclude that Mesagate's petition for a writ of mandamus was not the proper vehicle for challenging the issuance of the water treatment plant's building permit. Mesagate should have challenged the permit's legality with the Board of Appeals established by the Fernley Development Code.

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By not challenging the building permit in this manner, Mesagate failed to exhaust its administrative remedies, which precludes our consideration of the merits of this appeal.”

*Village League v. State* No. 49358 (October 30, 2008) “This petition arises out of an ongoing conflict between respondent the Nevada State Board of Equalization, real party in interest the Washoe County Assessor, and taxpayers from

failed to consider the merits of the case until April 2007 and, at that time, remanded the case to the County Board. Petitioners Chuck Otto, V Park, LLC, and Village League to Save Incline Assets (collectively, Taxpayers) now seek a writ of certiorari or mandamus declaring the State Board’s action in remanding the matter to the County Board to be in excess of its jurisdiction or an arbitrary exercise of its discretion.



the Incline Village and Crystal Bay areas. On March 8, 2006, the Washoe County Board of Equalization issued a general equalization decision for the 2006-2007 tax year, rolling back the taxable valuations of approximately 8,700 properties in Incline Village and Crystal Bay. The Assessor administratively appealed that decision to the State Board of Equalization, which

This petition requires us to consider whether the State Board had jurisdiction to hear the appeal from the County Board’s general equalization decision. We determine that the State Board retained jurisdiction to hear the appeal in April 2007, even though the statutory deadline had expired, because that deadline is directory, meaning that it is advisory rather than compulsory. Never-

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theless, the State Board has discretion to remand a matter to a county board only when the record before the State Board is inadequate because of ‘an act or omission of the county assessor, the district attorney or the county board of equalization.’ In this case, the County Board’s minutes were sufficient to enable the State Board’s review. Accordingly, the State Board arbitrarily remanded the matter, and we grant the Taxpayers’ petition for a writ of mandamus.”

*Estate of LoMastro v. American Family Ins.* No. 49125 (October 30, 2008) “ This matter arises from a single-vehicle rollover accident that claimed the driver’s life. The vehicle’s owner, a passenger in the vehicle who survived the accident, did not maintain automobile insurance on the vehicle. Thus, to recover insurance proceeds from the driver’s death, the driver’s parents made a claim with their insurance company, under the uninsured motorist provision of their policy. The parents’ insurance company denied the claim, contending that, under Nevada law, uninsured motorist coverage does not apply to single-vehicle accidents.

During this time, the driver’s parents also instituted an action against the vehicle’s owner, seeking to recover damages from him for their son’s death. The vehicle’s owner did not make an appearance in the action, and consequently, a default was entered against him. Nevertheless, the parents’ insurance company intervened, attempting to contest the driver’s liability and by extension to prevent it from being liable for the vehicle’s owner based on the driver’s parents’ uninsured motorist coverage. The district court ultimately refused to allow the insurance company to contest the driver’s liability, given the insurer’s belated intervention in relation to the entry of default against the driver. But the court nevertheless determined,

as the insurer had asserted in denying the parents’ insurance claim, that uninsured motorist coverage does not apply to single-vehicle accidents. Thus, regardless of the owner’s liability, the insurance company was not responsible to compensate the driver’s parents.

In this appeal, we consider whether an insurance company that has notice of a pending suit and the plaintiff’s intent to seek entry of default is bound by the entry of default if it later intervenes. We conclude that entry of default binds an insurance company intervenor as to the liability of an uninsured motorist defendant if the insurance company had notice of the litigation and the plaintiff’s intent to seek entry of default, but failed to intervene before a default was entered.

We also consider whether Nevada law requires physical contact between an uninsured motorist and the insured or the insured’s vehicle. That is, we address whether uninsured motorist coverage may apply to single-vehicle accidents. We determine that uninsured motorist benefits are available when an insured person is legally entitled to recover from the owner or operator of a vehicle that meets one of NRS 690B.020(3)’s statutory definitions for uninsured motor vehicle. The ‘physical contact’ requirement only applies to cases in which an unidentified or hit-and-run driver, as defined in NRS 690B.020(3)(f), is alleged to be negligent.”

*Five Star Capital Corp. v. Ruby* No. 48480 (October 30, 2008) “This appeal raises the issue of whether claim preclusion applies to prevent a party from bringing a second lawsuit when the first lawsuit was dismissed under a local court rule for failure to attend a pretrial

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calendar call. In resolving this issue, we clarify the tests for determining when claim preclusion or issue preclusion applies. We then conclude that claim preclusion applies in the present case and therefore affirm the district court's order granting summary judgment in favor of respondent based on its ruling that claim preclusion prevents appellant from bringing this second lawsuit."

*Rubio v. State* No. 48459 (October 30, 2008)  
"This appeal invites the court to consider whether counsel's affirmative misrepresentation regarding the possible immigration consequences of a guilty plea affects the voluntariness of the plea.

Appellant Manuela Rubio entered a guilty plea to battery with the use of a deadly weapon. After Rubio was deported, she filed a post-conviction motion to withdraw her guilty plea, claiming the court interpreter misadvised her and that her lawyer failed to meet with her to discuss the guilty plea agreement and plea canvass.

While we reaffirm our decision in *Barajas v. State*, holding that deportation is a collateral consequence that does not affect the voluntariness of a guilty plea, we take this opportunity to recognize that affirmative misrepresentation of immigration consequences by counsel is an exception to that general rule and may provide grounds for attacking the voluntariness of the plea. We reject, however, the application of such a rule to misrepresentations by a court interpreter. Because Rubio failed to allege that her attorney made affirmative misrepresentations regarding immigration consequences, we find no abuse of discretion in the district court's decision to deny her relief on that ground.

However, the district court did not conduct an evidentiary hearing or, in its order, address

Rubio's claim that her attorney failed to provide effective assistance. Therefore, the record is insufficient for us to determine if the facts surrounding Rubio's guilty plea substantiate this claim for relief. Accordingly, we affirm the district court's order to the extent that it did not impute the interpreter's alleged misadvice to counsel. But we reverse the district court's order to the extent that it denied Rubio's claims that counsel provided ineffective assistance and remand with instructions to hold an evidentiary hearing on the ineffective assistance of counsel allegations set forth in Rubio's affidavit supporting her motion."

*Cortinas v. State* No. 47905 (October 30, 2008)  
"The primary issue we address in this appeal is whether harmless-error review applies when a general verdict based on multiple theories of liability may rest on a legally invalid alternative theory. To resolve this issue, we must address relevant federal cases and reconcile two prior decisions by this court.

The United States Supreme Court first addressed the impact of a general verdict that may rest on a legally valid or a legally invalid alternative theory of liability in *Stromberg v. California*, in which the Court held that a general verdict delivered under these circumstances must be set aside unless it is possible to determine that the jury based the verdict on a legally valid ground. In *Keating v. Hood*, the Ninth Circuit Court of Appeals reasoned that reversal is required in such cases unless the court is 'absolutely certain' that the jury relied on a valid ground to reach its verdict.

We adopted Keating's absolute certainty approach to *Stromberg* error in *Bolden v. State*. After finding *Stromberg* error as the result of

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erroneous jury instructions on vicarious coconspirator liability for specific intent crimes, we reversed the defendant's convictions for several specific intent offenses that were committed by his coconspirators, explaining that we could not conclude with absolute certainty that the jury did not rely on the erroneous instructions when returning those verdicts. But in a more recent case, *Nay v. State*, we reviewed an instructional error that could be characterized as *Stromberg* error for harmless error under the *Chapman v. California* standard for harmless-error review. Accordingly, in *Nay*, after rejecting the use of an 'afterthought' robbery as the predicate felony for felony murder, we reversed the defendant's first-degree murder conviction because we could not determine beyond a reasonable doubt that the jury would have returned the same verdict had it been properly instructed.

In this appeal, we take the opportunity to reconcile *Bolden's* absolute certainty approach to *Stromberg* error with *Nay's* reliance on traditional harmless-error review. Contrary to *Bolden's* implications, we view *Stromberg* error as a subcategory of trial error that is susceptible to harmless-error review under the *Chapman* standard as it has been applied in our instructional error cases. Thus, we conclude that harmless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability. Accordingly, we retreat from *Bolden's* absolute certainty approach and reaffirm *Nay*.

Conducting harmless-error review in this case, we conclude beyond a reasonable doubt that the jury would have returned the same first-degree murder verdict had it not been misled that an afterthought robbery could satisfy the felony-murder rule. Although the general verdict form obscures the theory of liability that the jury selected, based on the overwhelming evidence of premeditated and delib-

erate murder presented at trial, as well as the jury's actual findings, presenting the jury with an invalid theory of felony murder was harmless error.

Separately, regarding the State's theory of robbery in this case, we reaffirm that the general intent and the taking required for robbery may occur after a victim is deceased so long as the use of force or coercion by the defendant—for whatever purpose—occurred while the victim was alive and the defendant took advantage of the terrifying situation he created to flee with the victim's property. Thus, we conclude that the district court did not improperly instruct the jury with regard to robbery.”

*Cook v. Sunrise Hospital & Medical Center* No. 47220 (October 30, 2008) “These appeals center on a ‘mere happening’ jury instruction—an instruction asserting that the mere happening of an accident is, by itself, an insufficient basis for liability—given by the district court in a medical malpractice action. Initially, we must determine whether appellants preserved for our review their objection to respondent's proposed jury instruction. We conclude that appellants' objection to the jury instruction was sufficient to preserve the claimed error for our review because the objection placed the district court on notice that the instruction's language required further review.

Next, we address whether the ‘mere happening’ instruction given by the district court misstated the law, and if the instruction was in fact erroneous, whether appellants have proven that the inaccurate instruction was prejudicial rather than harmless error. The jury instruction given by the district court in this matter set forth that ‘the mere fact that an unfortunate or bad condi-

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tion resulted to the patient involved in this case does not prove, or even imply, that by virtue of that fact, the defendant is negligent.’ This instruction misstated Nevada law because the instruction failed to inform the jury that it could consider all of the circumstances leading to the plaintiff’s injury as possible evidence of the defendant’s negligence, and thus, the instruction may have confused or misled the jury to its verdict. Given this conclusion, we also must consider whether appellants have proven that the inaccurate instruction was prejudicial rather than harmless error. After reviewing the evidence, we conclude that prejudice was shown because, but for the mistake in instructing the jury, it is probable that a different result may have been reached as the case was close and appellants introduced evidence that could support a finding of negligence against respondent.

Because the given jury instruction misstated the law, which could have confused or misled the jury, and appellants have met their burden of showing prejudice, we reverse the district court’s judgment and remand this matter to the district court for a new trial. We also vacate the district court’s order awarding costs and fees to respondent since we have reversed the judgment upon which this award was based.”

*Rivero v. Rivero* No. 46915 (October 30, 2008)  
“Appellant Michelle Rivero and respondent Elvis Rivero’s divorce decree provided for ‘joint physical custody’ of their minor child, with Ms. Rivero having the child five days each week and Mr. Rivero having the child two days each week. The decree awarded no child support. After the divorce decree was entered, Ms. Rivero brought a motion to modify child custody and support. The district court ordered that the decree would remain in force, with the parties having joint cus-

tody of their child and neither party receiving child support. The district court deferred ruling on the motion to modify custody and ordered the parties to mediation to devise a timeshare plan. Ms. Rivero then requested that Judge Miley recuse herself. When Judge Miley refused to recuse herself, Ms. Rivero moved to disqualify Judge Miley. Chief Judge Hardcastle denied Ms. Rivero’s motion for disqualification, concluding that she lacked reasonable grounds to bring it. The district court later awarded Mr. Rivero attorney fees, finding that Ms. Rivero’s motion for disqualification was frivolous. The parties were unable to reach a timeshare agreement in mediation. Following mediation, after hearing sworn testimony from the parties, the district court modified the custody arrangement from a five-day, two-day split to an equal timeshare. Ms. Rivero appeals.

We are asked to resolve several custody and support issues on appeal. Preliminarily, the parties dispute the definition of joint physical custody. Additionally, Ms. Rivero challenges the district court’s determination that the parties had joint physical custody, modification of the custody arrangement, denial of her motion for child support, and Judge Miley’s refusal to recuse herself and Chief Judge Hardcastle’s denial of Ms. Rivero’s motion for disqualification of Judge Miley.

First, addressing the definition of joint physical custody, we adopt a definition that focuses on each parent spending a significant amount of time with the child to ensure that the child has meaningful contact with both parents, without requiring a specific timeshare.

Second, we conclude that the district court abused its discretion by finding that the parties

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had a joint physical custody arrangement without setting forth specific findings of fact to support its determination.

Third, we also conclude that the district court erred by modifying the custody timeshare arrangement without making specific findings of fact that the modification was in the child's best interest.

Fourth, we address the appropriate formula for determining child support when the parties have joint physical custody with an unequal timeshare. To account for differences in the parents' incomes and the financial costs of caring for the child, we extend the formula set forth in *Wright v. Osburn*, which accounts for income disparities, but we modify it to factor in the unequal timeshare variable. Here, the district court abused its discretion by denying Ms. Rivero's motion to modify child support without making any factual findings to justify its decision. Child support determinations, even in situations involving joint physical custody, must follow legislative objectives that require each parent to provide a certain level of support for their child in accordance with their respective incomes. When a joint physical custody arrangement exists, child support must be calculated according to *Wright* if the timeshare is equal, or if the timeshare is unequal, according to the modified *Wright* formula set forth in this opinion.

Finally, having considered the record and the parties' arguments, we conclude that Judge Miley properly refused to recuse herself, and Chief Judge Hardcastle properly denied Ms. Rivero's motion for disqualification because the motion was frivolous. The record contains no evidence that Judge Miley had personal bias against either of the parties. We further conclude the district court acted within its discretion by awarding attorney fees as a sanction for the frivolous motion."

*Hernandez v. State* No. 44812 (October 30, 2008) "In this appeal, we consider whether we should extend the holding in our decision in *McConnell v. State* to bar the dual use of torture as a theory of first-degree murder and as an aggravating circumstance to support a death sentence. We conclude that *McConnell* does not preclude the State from securing a murder conviction based upon a theory of torture and alleging torture as an aggravating circumstance in seeking a death sentence. Nevada's definition of torture murder sufficiently narrows the class of persons eligible for the death penalty to allow the dual use of torture as exercised in this case. However, *McConnell* requires us to strike the burglary aggravating circumstance, leaving two remaining aggravating circumstances—the murder involved torture or mutilation and the defendant subjected the victim to nonconsensual sexual penetration. After reweighing the remaining aggravating and mitigating evidence, we conclude beyond a reasonable doubt that the jury would have found appellant Fernando Navarro Hernandez death eligible and imposed death absent the erroneous aggravating circumstance. We therefore affirm the district court's order denying post-conviction relief."

*State v. Harte* No. 50161 (October 30, 2008) "In this opinion, we consider the State's contention that *McConnell v. State* was wrongly decided and its alternative argument that a new trial is an appropriate remedy when the sole aggravating circumstance in a death penalty case has been determined to be invalid under *McConnell* during post-conviction review. We reject the State's contention that *McConnell* was wrongly decided, and we conclude that a new penalty hearing is the proper remedy under the circumstances described by the State."

## LAW.COM

### **Law.com** **The Registry of Dope Smokers**

By a landslide margin, Massachusetts voters last week passed Question 2, a ballot initiative decriminalizing possession of an ounce or less of marijuana. Even though the law will not take effect until 30 days after it is endorsed by the state's governor's council, it has already left law enforcement officials with anything but a case of the giggles. The problem, officials say, is that the initiative said nothing about how it should be administered and enforced. As Michael O'Keefe, district attorney on Cape Cod and president of the Massachusetts District Attorneys Association, told the *Cape Cod Times*, while the state has a Registry of Motor Vehicles to collect speeding fines, "we don't have a registry of dope smokers in Massachusetts, and apparently we're going to have to create one in order to effectuate the statute."

The state's district attorneys were meeting this week to try to come up with a plan, and Attorney General Martha Coakley (who was otherwise occupied yesterday, arguing before the Supreme Court) said her office would play a role. "Question 2's passage not only authorizes the decriminalization of small amounts of marijuana, but also establishes a parallel civil regulatory structure that does not currently exist," she said in a statement. Other states that have decriminalized possession of small amounts of marijuana handle administration in various ways, the *Cape Cod Times* article notes. In Maine, fines are assessed and collected through the court system. In Ohio, one can pay the fine through the mail or appear in court to contest the citation, similar to a speeding ticket.

Under the Massachusetts law, anyone caught with an ounce or less of marijuana must pay a \$100 fine. Minors must also attend drug educa-

tion and treatment classes and perform community service. Not only does this scheme raise questions about its administration, but it also creates a new set of questions for police officers who find someone with marijuana, says an article in *The Berkshire Eagle*. "Can we interview them? Can we interrogate them?" wonders a Pittsfield police captain. "It's going to be real tricky to figure out what this means, and there's no question that people are going to take advantage of this." One outcome seems fair to predict: If you thought lines were slow at the Registry of Motor Vehicles, just wait until you see how the long wait seems at the Registry of Dope Smokers.



## NINTH CIRCUIT CASES

*Busseto Foods, Inc. v. Charles Laizure* 06-16857 (November 17, 2008) “In this bankruptcy case, we determine whether a creditor that is required to return to the trustee a payment from the debtor made within the ninety-day preference period still maintains a claim against the debtor for a nondischargeable claim. Busseto Foods, Inc. (‘Busseto’) contends that the payment it was required to pay to the trustee was a repayment of funds embezzled by the debtor, Charles Laizure, and thus a nondischargeable claim. The Bankruptcy Appellate Panel (‘BAP’), in affirming the bankruptcy court, held that 11 U.S.C. § 502(h) only allows Busseto to bring a claim against the bankruptcy estate and not against the debtor, Laizure.

We have jurisdiction pursuant to 28 U.S.C. § 158(d)(1) and we reverse the decision of the BAP and remand for further proceedings.

Busseto employed Charles Laizure as its controller and chief financial officer from February 1, 1998 until August 20, 2004. After Laizure left, Busseto discovered he had embezzled a large amount of money during his employment. After admitting he took the money, Laizure agreed to repay the funds in installments. He first paid Busseto \$10,000 in December 2004 and then \$30,000 on February 18, 2005. On June 5, 2005, Laizure arranged a final payment of \$38,833.70 to Busseto to be paid directly from escrow upon the closing of the sale of his house. Shortly thereafter escrow closed and Busseto received the final payment.

Less than ninety days after the \$38,833.70 payment to Busseto, Laizure filed a Chapter 7 bankruptcy petition on August 17, 2005. After learning of Laizure’s June payment to Busseto, the Chapter 7 trustee pursuant to 11 U.S.C. § 547

sent Busseto a letter demanding the return of the \$38,833.70 because Laizure had made the payment during the ninety-day preference period.

Busseto and the trustee then engaged in negotiations to settle the matter. Fearing the negotiations would not resolve the issue as the nondischargeability filing deadline approached, Busseto filed the complaint at issue here on November 17, 2005 to determine the amount and dischargeability of Laizure’s debt. The complaint alleged that, because of Laizure’s embezzlement and other conduct involved with the debt, any amount returned to the trustee pursuant to the demand should be held nondischargeable under 11 U.S.C. § 523(a)(4).

After filing the complaint, Busseto agreed with the trustee to pay the estate \$34,000 to resolve the preference matter. Busseto then filed a claim against the bankruptcy estate for \$34,000. During the bankruptcy proceedings, the trustee collected only a total of \$34,628.83, \$34,000 of which came from Busseto. After deducting compensation and expenses for the trustee in the amount of \$4,253.38, the balance of \$30,375.45 was used to pay Laizure’s priority tax claims.

While the estate was being settled, Laizure filed a motion in bankruptcy court to strike Busseto’s November 17 complaint or in the alternative, for a more definite statement. The bankruptcy court granted Laizure’s motion to dismiss Busseto’s complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The bankruptcy court reasoned that ‘there was no debt on the day the bankruptcy was filed’ because Busseto was fully repaid at that time. In addition, no debt existed on the date the complaint was filed because Busseto had not yet returned any money to the estate on that date.

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The bankruptcy court also found that § 502(h) does not ‘revive . . . individual liability that can be imposed . . . on the debtor.’ Busseto then appealed this decision to the Bankruptcy Appellate Panel.

On appeal to the BAP, Busseto argued that § 502(h) reinstated its claim against Laizure after Busseto paid the settlement of the trustee’s claim. However, the BAP, in affirming the bankruptcy court, concluded that § 502(h) does not permit Busseto to ‘reinstat[e] its claim against the debtor once it paid the settlement of the trustee’s claim.’ *Busseto Foods, Inc. v. Laizure (In re Laizure)*, 349 B.R. 604, 607 (B.A.P. 9<sup>th</sup> Cir. 2006). The BAP emphasized that it read the relevant statutes to say that, under § 502(h), Busseto could bring a claim against the estate but not the debtor. *Id.*

The BAP also briefly addressed the bankruptcy court’s ruling that no debt existed on the petition date and Busseto’s counter-argument that it did have a contingent claim under the Code’s broad definition of ‘claim.’ *Id.* at 607-08. The BAP agreed with the bankruptcy court that no claim existed on the petition date and further stated that even if Busseto had a contingent claim on the petition date, § 727(b) would likely ‘eviscerate [Busseto’s] position.’ *Id.* at 608.”

“In addition to its main findings, the BAP determined that even if Busseto had a claim, § 727(b) would likely foreclose it by discharging any claim arising under § 502. See *In re Laizure*, 349 B.R. at 608. However, this statement ignores very key introductory wording in § 727(b), which excepted claims brought pursuant to § 523. See 11 U.S.C. § 727(b) (‘Except as provided in section 523 of this title . . .’).

Here, Busseto brought its claim under § 523(a)(4), which states: A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11 U.S.C. § 523(a)(4). Reading both statutes according to their clear and plain meaning, § 727 does not foreclose Busseto’s argument. Instead, § 727 does not apply because it excepts claims brought under § 523, such as Busseto’s claim against Laizure for embezzlement.

Finally, this conclusion best advances the policies of our bankruptcy laws. As the Supreme Court has explained, ‘the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor.’ *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (citations and internal quotations omitted). The Court later stated that these ‘statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts . . . [including] liabilities for fraud.’ *Id.* at 287. Here, allowing Laizure to avoid repaying the funds he embezzled from Busseto would contravene Congress’ intent. A contrary conclusion would only encourage debtors to pay outstanding debts that are nondischargeable and later file for bankruptcy protection, thus avoiding the nondischargeability of their debt under the veil of our bankruptcy laws.

For the reasons stated, the BAP erred in affirming the bankruptcy court’s dismissal of Busseto’s complaint. Because of the dismissal under 12(b)(6), the bankruptcy court did not reach the factual issue of whether Laizure’s debt is nondischargeable. We REVERSE the decision of the BAP, and we REMAND for further proceedings.”

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*Cook v. Avi Casino Enterprises, Inc.* 07-15088 (November 14, 2008) “Plaintiff Christopher Cook (‘Cook’), a California resident, seeks recovery for damages suffered as a result of a motor vehicle accident in which, while on a motorcycle, he was hit by a drunk driver. The driver was an employee of defendant Avi Casino Enterprises, Inc. (‘ACE’), a tribal corporation, and she allegedly became intoxicated at an Avi Casino function. Cook sued the tribal corporation and several of its employees, alleging negligence and dram shop liability. Defendants asserted defenses based on federal Indian law. Defendants claim (1) that there is an absence of subject matter jurisdiction because the Indian tribe that owns ACE is, like Cook, a California citizen and (2) that tribal sovereign immunity shields ACE and its employees from suit.

We affirm the district court, in part on alternate grounds supported by the record. We agree with Cook that we have jurisdiction over ACE because there is diversity of citizenship. However, we affirm the dismissal of Cook’s claims against ACE on the alternate ground of tribal sovereign immunity. We affirm the district court’s dismissal of defendants Ian Dodd (‘Dodd’) and Debra Purbaugh (‘Purbaugh’) on the same ground and do not reach Defendants’ other arguments for dismissal.”

*In Re James H. Gallaher, Jr.* 07-74593 (November 13, 2008) “In the classic words of the Rolling Stones, ‘You can’t always get what you want.’ The Rolling Stones, *You Can’t Always Get What You Want*, on *Let It Bleed* (Decca Records 1969). A defendant who chooses to take a conditional plea cannot always assume the court will grant its consent. And, a district court that wants to review a defendant’s Presentence Report (PSR) cannot do

so until the defendant has granted his consent or entered a plea. Consequently, we are forced to disappoint both the district court and the petitioner in this appeal. Because the district court exercised its discretion to deny its consent to Gallaher’s conditional plea, the petition for a writ of mandamus must be denied. However, because the district court erred by prematurely reviewing Gallaher’s PSR, we remand for further proceedings, and reassign this case to a new judge to consider de novo whether to accept Gallaher’s conditional plea.

*Halicki Films, LLC v. Carroll Shelby International, Inc.* 06-55817 (November 12, 2008) “Plaintiffs, Denice Shakarian Halicki, Original Gone in 60 Seconds, LLC, and Halicki Films, LLC (collectively, the ‘Plaintiffs’ or ‘Halicki’), appeal from so much of a November 14, 2005 summary judgment of the United States District Court for the Central District of California as granted defendants’ — Unique Motorcars, Inc. and Unique Performance, Inc. (collectively, the ‘Unique Defendants’); and Carroll Shelby International, Inc., Carroll Shelby Licensing, Inc., Carroll Shelby Motors, Inc., Carroll Shelby Distribution, International, Inc., and Carroll Shelby Hall Trust (collectively, the ‘Shelby Defendants’ and collectively with the Unique Defendants, the ‘Defendants’) — motion for summary judgment dismissing Plaintiffs’ claims for: (1) copyright infringement; (2) common law trademark infringement; (3) federal unfair competition; and (4) declaratory relief. The District Court found that Plaintiffs lacked standing to assert the foregoing claims. For the reasons that follow, we hold that the District Court erred in (1) its refusal to use extrinsic evidence submitted by Plaintiffs to aid in its interpretation of an agreement between the parties, finding that the extrinsic evidence did not show that the agreement was reasonably susceptible to Plaintiffs’ interpretation; (2) its interpretation of disputed language in an agree-

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ment between Halicki and a corporation, not a party to this action; (3) its application of the wrong legal standard in concluding that Plaintiffs did not have statutory standing to assert their claims for trademark infringement and unfair competition; and (4) its conclusion that Plaintiffs did not have statutory or Article III standing to assert their claims for declaratory relief. We therefore vacate the District Court’s grant of summary judgment dismissing Plaintiffs’ copyright, common law trademark infringement, unfair competition, and declaratory relief claims

and the Lanham Act, 15 U.S.C. § 1117(a). Because none of Halicki’s claims are frivolous or unreasonable, we affirm the District Court’s conclusion that the Shelby Defendants are not entitled to attorneys’ fees.”

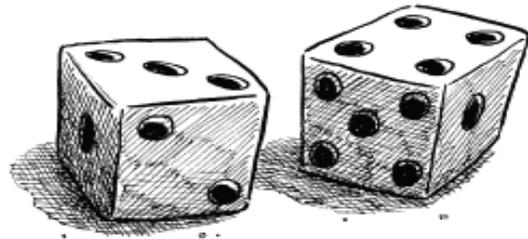
*United States v. Williams* 06-50599 (November 7, 2008) “David Williams, William Steel, and Talford Brown appeal their convictions following a jury trial for conspiracy to interfere with interstate commerce by robbery, conspiracy to possess cocaine with the intent to distribute, and possession

of a

### MODERN RESOURCES FOR *the* WALL STREET TRADER



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and remand the case for further proceedings.

The Shelby Defendants appeal from the District Court’s denial of their motion for attorneys’ fees under both the Copyright Act, 17 U.S.C. § 505,

firearm during a drug crime and crime of violence. Williams, Steel, and Brown argue, inter alia, that there was insufficient evidence to support their convictions, that their indictment should have been dismissed because of outrageous gov-

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ernment conduct, and that the district court should have declared a mistrial because a juror revealed that she was the lone holdout. We hold that there was sufficient evidence to support the convictions and that the government did not deny the defendants their due process rights by engaging in outrageous conduct. Because the district court gave an *Allen* charge after a juror disclosed that she was a holdout, we reverse and remand for a new trial.”

The following account is taken from the evidence introduced at trial. Around August 2002, a man identified only as ‘Marty’ introduced Williams as a drug dealer to a paid government informant named Tony. During that month, Tony and Williams planned a marijuana sale in New Orleans. Tony was to provide the marijuana, and Williams was to put Tony in contact with a buyer. The deal did not go through, but Williams and Tony continued to negotiate planned drug transactions, including one involving cocaine from Belize and one involving a ten to fifty kilogram cocaine purchase by Williams. At some point during their association, Williams confessed to Tony that he had pleaded no contest to and was wanted for a bank robbery in Texas. A few days before October 25, 2002, Williams told Tony about a bank robbery he had planned, and that he needed to sell a firearm to raise money to rent the getaway car. Williams already had planned the bank robbery in some detail, having identified the target bank and recruited someone on the inside of the bank to help. Williams tried to enlist Tony to be the getaway driver. Tony relayed this information to Floyd Mohler, an agent with the Bureau of Alcohol, Tobacco and Firearms (‘ATF’), who proposed that Tony pitch the idea of robbing a fictitious drug stash house in lieu of robbing the bank.”

“On November 13, Williams met Penate at another restaurant near a motel in San Diego (‘San Diego motel’) and discussed the final details of the stash house robbery planned for the next day. Williams told Penate that the other members of the crew were following him and that they had brought some things so they could ‘handle’ themselves. Penate told Williams that he had rented a room at another motel (‘Chula Vista motel’) five blocks from the stash house in Chula Vista, which they would use to stage the robbery. He also told Williams that there would be over one hundred kilograms of cocaine and about \$100,000 in cash in the house at the time of the robbery. Penate rented a minivan for Williams to drive. Williams said that he had three people involved, two who knew the plan and one who was just driving the guns and police radio down. After this meeting, they retired to the room Penate had rented at the San Diego motel, which had been wired for audio and video recording.

Penate described to the four men the details of the plan at this meeting, including how they would enter the house. He told them if they did not want to participate, they should say so and ‘be on your way.’ Brown audibly indicated his willingness to participate, and Penate testified that Williams, Steel, and Hollingsworth nodded their assent. Williams, Steel, Brown, and Hollingsworth then wiped the room free of fingerprints. While they prepared to leave, Williams asked Brown, ‘How many you got?’ Brown replied, in an apparent reference to the number of bullets in his gun, ‘I will got nine, but I only need one.’

Penate, the three appellants, and Hollingsworth then left the San Diego motel to drive to the second motel in Chula Vista. Penate drove a blue Ford Explorer; Williams followed in the rented

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minivan, then Hollingsworth in a Jaguar sedan. Steel completed the caravan with Brown as a passenger in a Dodge Intrepid. All four vehicles pulled into the Chula Vista hotel; only Williams followed Penate into the rear parking area where the SWAT team deployed a flash-bang grenade before arresting Williams. Steel and Brown, in the Dodge Intrepid, left the Chula Vista hotel shortly after arriving. The Chula Vista police stopped them as they drove away. The officers ordered Steel and Brown out of the car and arrested them; a search of Brown upon his arrest revealed a gun holster on his waist.

“The facts presented by Williams, Steel, and Brown clearly ‘support an inference’ that a juror who disagreed with the majority felt pressure from the court to give up her conscientiously held belief. *Id.* The juror’s note to the judge stated that she felt ‘very strong’ about her decision and that she disagreed with her fellow jurors, who she felt had already convicted the defendants ‘on all accounts.’ She named specific issues material to the determination of guilt, which she said she could not ‘get pas[t].’ She also said she ‘could not face the defendants’ with the charges that the other jurors wished to sustain. In response to that unambiguously worded note, the district court instructed the jury to continue deliberating and for the jurors to consider changing positions ‘if the discussion persuades you that you should.’ This kind of situation is the precise type of situation for which the *Allen* framework has been developed: Juror No. 1 knew that the judge knew her position and reasonably—in fact, more than likely—could have interpreted the supplemental instruction to be directed at her.”

“That there was no indication here that the jury had taken a vote or that the foreperson believed

that further deliberations would not be productive does not change our conclusion. When a juror clearly discloses to the district court that she disagrees with the rest of the jury and that she cannot return a different verdict, as Juror No. 1 disclosed here, the district court cannot give a supplemental instruction instructing the jury to continue deliberating. *Ajiboye*, 961 F.2d at 894; *Sae-Chua*, 725 F.2d at 532.

Accordingly, the district court abused its discretion in denying the appellants’ motion for a mistrial. We REVERSE the judgment of the district court and REMAND for a new trial.”

*Sullivan v. Oracle Corporation* 06-56649 (November 6, 2008) “Oracle Corporation (‘Oracle’), a large software company, has employed hundreds of workers to train Oracle customers in the use of its software. During the period relevant to this suit, Oracle classified these workers as teachers who were not entitled to compensation for overtime work under either federal or California law. Three nonresidents of California brought a would-be class action against Oracle seeking damages under California law for failure to pay overtime. Plaintiffs performed only some of their work for Oracle in California. Plaintiffs’ first two claims are based on work performed in California. Their third claim is based on work performed anywhere in the United States.

The district court granted summary judgment to Oracle on all three claims, on the ground that the relevant provisions of California law did not, or could not, apply to the work performed by Plaintiffs. We reverse the summary judgment on the first two claims and affirm on the third claim.”

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“For a number of years, Oracle classified its Instructors as ‘teachers,’ who are exempt from the overtime provisions of California’s Labor Code (‘Labor Code’) and the federal Fair Labor Standard Act (‘FLSA’). *See, e.g.*, 29 U.S.C. § 213(a)(1) (providing exemptions from the FLSA’s overtime provisions); 29 C.F.R. §§ 541.303(a)-(b) (applying FLSA exemption to certain categories of teachers); *Cal. Sch. of Culinary Arts v. Lujan*, 4 Cal. Rptr. 3d 785, 791-92 (Ct. App. 2003) (describing regulations establishing exemption for teachers from the Labor Code’s overtime provisions). The parties stipulated that Oracle’s California offices were primarily responsible for the decision to classify the Instructors as ‘teachers’ who were exempt from the overtime provisions of the Labor Code and the FLSA.

In 2003, Oracle reclassified its California-based Instructors and began paying them overtime under the Labor Code. In 2004, Oracle reclassified all of its Instructors working in the United States and began paying them overtime under the FLSA. Oracle has not retroactively provided overtime payments to Plaintiffs for the work they performed prior to the reclassification.

Oracle’s reclassification of its Instructors appears to have been prompted by a 2003 class action in federal district court for the Central District of California. Plaintiffs in that suit claimed that Oracle misclassified its Instructors under the Labor Code and the FLSA. *Gabel & Sullivan v. Oracle* (‘Sullivan I’), Case No. SACV 03-348 AHS (MLGx) (C.D. Cal. Mar. 29, 2005). The district court certified two classes. The first was comprised of plaintiffs seeking damages under the Labor Code; the second was comprised of plaintiffs seeking damages under the FLSA. That suit was settled,

resulting in a dismissal with prejudice of the claims of both classes. However, claims brought by plaintiffs under California law ‘for periods of time they may have worked in the State of California when they were not a resident of the State’ were excepted from the settlement. Those claims were dismissed without prejudice.

Plaintiffs brought the present suit in state court shortly thereafter. Oracle removed the suit to the federal district court for the Central District of California, where it was assigned to the same district judge as Sullivan I, the first suit. Plaintiffs allege three claims in the present suit. They seek class certification for all three claims.

The first claim, brought by all three Plaintiffs, alleges a violation of the California Labor Code. *See, e.g.*, Cal. Lab. Code § 510(a); see also *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1073 n.18 (9th Cir. 2007). Plaintiffs allege that Oracle failed to pay overtime for work performed in California to Instructors domiciled in other states who worked complete days in California. We refer to this claim as the ‘Labor Code claim.’

The second claim, brought by all three Plaintiffs, alleges a violation of California’s Unfair Competition Law, commonly referred to as § 17200. *See* Cal. Bus. & Prof. Code § 17200 *et seq.* This claim is predicated on the violations of the Labor Code alleged in the first claim. We refer to this claim as the ‘§ 17200/Labor Code claim.’

The third claim, brought only by Plaintiffs Evich and Burkow, alleges a different violation of § 17200. This claim is predicated on violations of the FLSA. Plaintiffs allege that Oracle failed to pay overtime for work performed throughout the United States. Class members in *Sullivan I* who settled their claims against Oracle are not in-

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cluded in the would-be class. We refer to this claim as the ‘§ 17200/FLSA’ claim. The district court granted summary judgment to Oracle on all three claims. On the first and second claims, the court held that California’s Labor Code (and, derivatively, § 17200) do not apply to nonresidents who work primarily in other states. Further, the court held that if the Labor Code were construed to apply to such work, it would violate the Due Process Clause of the Fourteenth Amendment. On the third claim, the court held that § 17200 does not apply to work performed outside California and that to the extent the third claim involved work performed in California, the claim failed ‘for the same reasons that Plaintiffs’ § 17200 claim based on Labor Code provisions fails.’”

“We reverse the district court’s grant of summary judgment on Plaintiffs’ first two claims. We hold that California’s Labor Code applies to work performed in California by nonresidents of California. We affirm the district court’s grant of summary judgment on Plaintiffs’ third claim. We hold that § 17200 does not apply to allegedly unlawful behavior occurring outside California causing injury to nonresidents of California. REVERSED in part, AFFIRMED in part, and REMANDED for further proceedings. Costs to Plaintiffs- Appellants.”

*Humphries v. Count of Los Angeles* 05-56467 (November 5, 2008) “Appellants Craig and Wendy Humphries are living every parent’s nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them ‘factually

innocent’ of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as ‘not true.’

Notwithstanding the findings of two California courts that the Humphries were ‘factually innocent’ and the charges ‘not true,’ the Humphries were identified as ‘substantiated’ child abusers and placed on California’s Child Abuse Central Index (‘the CACI’), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This case presents the question of whether California’s maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does.”

*E.S.S Entertainment v. Rockstar Videos* 06-56237 (November 5, 2008) “We must decide whether a producer of a video game in the ‘Grand Theft Auto’ series has a defense under the First Amendment against a claim of trademark infringement.”

“On April 22, 2005, ESS filed the underlying trademark violation action in district court against Rockstar. ESS asserted four claims: (1) trade dress infringement and unfair competition under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (2) trademark infringement under Cali-

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California Business and Professions Code § 14320; (3) unfair competition under California Business and Professions Code §§ 17200 et seq.; and (4) unfair competition under California common law. The heart of ESS's complaint is that Rockstar has used Play Pen's distinctive logo and trade dress without its authorization and has created a likelihood of confusion among consumers as to whether ESS has endorsed, or is associated with, the video depiction.

In response, Rockstar moved for summary judgment on all of ESS's claims, arguing that the affirmative defenses of nominative fair use and the First Amendment protected it against liability. It also argued that its use of ESS's intellectual property did not infringe ESS's trademark by creating a 'likelihood of confusion.'

Although the district court rejected Rockstar's nominative fair use defense, it granted summary judgment based on the First Amendment defense. The district court did not address the merits of the trademark claim because its finding that Rockstar had a defense against liability made such analysis unnecessary."

"Considering all of the foregoing, we conclude that Rockstar's modification of ESS's trademark is not explicitly misleading and is thus protected by the First Amendment. Since the First Amendment defense applies equally to ESS's state law claims as to its Lanham Act claim, the district court properly dismissed the entire case on Rockstar's motion for summary judgment. AFFIRMED."

*Truckstop.net, LLC v. Sprint Corporation* 07-35123 (October 28, 2008) "The threshold issue in this appeal is a rather straightforward ques-

tion: Do we have appellate jurisdiction under the collateral order doctrine to review a district court's interlocutory order addressing whether an inadvertently disclosed e-mail is protected by the attorney-client privilege? We hold that because the allegedly privileged information has already been disclosed we do not have jurisdiction and thus dismiss this appeal.

Following our prior precedent, we hold that this court lacks appellate jurisdiction under the collateral order doctrine to consider Sprint Communications' appeal. Although Sprint Communications' inadvertent disclosure during the course of discovery of the Neal e-mail may be unfortunate, the chicken has already flown the coop — the alleged harm from disclosure has already occurred. Sprint Communications has already produced the allegedly privileged document and has not alleged any additional harm that is not effectively reviewable on appeal from a final judgment. The Supreme Court has cautioned that 'the 'narrow' exception [provided by the collateral order doctrine] should stay that way and never be allowed to swallow the general rule, that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'"

*Digital Equip. Corp.*, 511 U.S. at 868. Accordingly, because we hold that we lack appellate jurisdiction under 28 U.S.C. § 1291, the appeal is DISMISSED."

*United States v. Snellenberger* 06-50169 (October 28, 2008) "We must decide whether a court may consider a clerk's minute order when applying the modified categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990).

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Michael Snellenberger walked into a bank with a threatening note and walked out with a small sum of money. He was quickly arrested and eventually pleaded guilty to unarmed bank robbery. The district court calculated a Sentencing Guidelines range of 151 to 188 months and sentenced Snellenberger to 151 months. On appeal, he challenges the calculation of the sentencing range.

Snellenberger's sentencing range was greatly elevated when the district court determined that he was a career offender. To qualify as a career offender, a defendant must be convicted of a crime of violence or a drug offense after having previously committed two such crimes. U.S.S.G. § 4B1.1(a). Snellenberger's crime of conviction, bank robbery, is a crime of violence; one of his prior convictions, sale of methamphetamine, is a drug offense. Under dispute is his other prior: burglary in violation of California Penal Code § 459.

A 'crime of violence,' as defined in U.S.S.G. § 4B1.2(a), includes (among other things) 'burglary of a dwelling.' If Snellenberger's prior conviction qualifies as burglary of a dwelling, it's a crime of violence. There are two possible reasons why it might not qualify: First, California's burglary statute is broader than the generic definition of burglary adopted by the Supreme Court as the benchmark in *Taylor*. Generic burglary is limited to entry into a 'building or other structure,' 495 U.S. at 598, whereas California burglary covers entry into all manner of other places—tents, railroad cars, automobiles, aircraft, mines, even outhouses. Second, the Sentencing Guidelines are even narrower than the generic definition of burglary; whereas generic burglary may be committed in a commercial building, only burglaries of dwellings

qualify as crimes of violence.

When the statute of conviction is broader than the generic definition, we can't tell categorically whether the prior conviction qualifies as a strike. Rather, we must use the so called modified categorical approach, which requires us to determine—if we can—whether the conduct for which the defendant was convicted fits within the federal definition of the offense. *Id.* at 602. As applied to Snellenberger, we must figure out whether the conduct to which he pleaded guilty was burglary of a building or other structure (as *Taylor* requires) and further whether the burglary was of a dwelling (as the Sentencing Guidelines require). If we can tell both of these things with reasonable certainty, the prior conviction counts and Snellenberger is a career criminal.

The Supreme Court in *Shepard v. United States*, 544 U.S. 13 (2005), listed the types of documents we may consider in applying the modified categorical approach: 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.' *Id.* at 16. We have the charging document—here an information—but it charges two burglaries. Count 1 charges burglary of a 'dwelling house,' but count 2 charges burglary of a vehicle. Other than the statutory definition, the record contains none of the documents to which the Supreme Court refers in *Shepard*. How can we tell, then, whether Snellenberger pleaded guilty to count 1 (which would count as a strike against him) or count 2 (which wouldn't)?

The district court relied on the state court clerk's minute order. California Penal Code § 1207 provides that '[w]hen judgment upon a conviction is rendered, the clerk must enter the judgment in

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the minutes, stating briefly the offense for which the conviction was had . . . . A copy of the judgment of conviction shall be filed with the papers in the case.”

“Snellenberger challenges the district court’s reliance on the minute order, arguing that it isn’t among the documents listed by the Court in *Shepard*. But that list was illustrative; documents of equal reliability may also be considered. See *Shepard*, 544 U.S. at 26 (permitting use of ‘comparable’ judicial records). The clerk’s minute order easily falls within the category of documents described: It’s prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately. The clerk presumably exercises that duty as faithfully and diligently as, for example, court reporters, upon whose transcripts we regularly depend. Indeed, the *Shepard* list expressly references the transcript of the plea colloquy as a document we may properly rely on, even though the transcript itself (as opposed to the reporter’s notes on which it is based) is generally prepared days or weeks—and sometimes years—after the in-court proceedings.”

“We therefore hold that district courts may rely on clerk minute orders that conform to the essential procedures described above in applying the modified categorical approach. *United States v. Diaz-Argueta*, 447 F.3d 1167, 1169 (9th Cir. 2006), which suggested the contrary, is to that extent overruled.”

*United States v. Fiander* 07-30251 (October 23, 2008) “Roger Fiander, a member of the Confederated Tribes and Bands of the Yakama Nation, was charged with several other defendants in a multi-count indictment with numerous viola-

tions related to trafficking in contraband cigarettes. The charges included violations of the Contraband Cigarette Trafficking Act (‘CCTA’), 18 U.S.C. § 2342(a); conspiracy to violate the CCTA, 18 U.S.C. §§ 2, 371, and 2342(a); conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (‘RICO’), 18 U.S.C. § 1962(d); and money laundering, 18 U.S.C. §§ 1956 and 1957. Fiander agreed to plead guilty to Count One of the indictment, conspiracy to violate RICO, and the government agreed to move to dismiss the numerous other counts. Shortly thereafter, however, we decided *United States v. Smiskin*, 487 F.3d 1260 (9<sup>th</sup> Cir. 2007), holding that the application of the CCTA to Yakama Indians violated the Yakama Treaty of 1855. We therefore upheld the dismissal of an indictment against two members of the Yakama Nation. Pursuant to *Smiskin*, after briefing, the district court dismissed the indictment. The government timely appealed. We have jurisdiction pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291, and we now reverse.”

*Granite Rock Company v. Local 287* 07-15040 (October 22, 2008) “Granite Rock Company (‘Granite Rock’) sued International Brotherhood of Teamsters, Local 287 (‘Local 287’) and International Brotherhood of Teamsters (‘IBT’) under section 301(a) of the Labor Management Relations Act (‘LMRA’) with claims relating to a collective bargaining agreement. Granite Rock seeks remedies against Local 287 for breach of the collective bargaining agreement, and against IBT for tortious interference with the collective bargaining agreement between Granite Rock and Local 287. The district court dismissed the claim against IBT under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Granite Rock appeals that dismissal, and we affirm.

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In the dispute between Granite Rock and Local 287, the parties appeal and cross-appeal a total of five orders, but we need reach only one: the district court's denial of Local 287's motion to compel arbitration on the question of contract formation. We reverse that ruling and remand with instructions to compel arbitration on the entire dispute between Granite Rock and Local 287.

We AFFIRM the district court's judgment dismissing Granite Rock's claims against IBT, and we REVERSE and REMAND the district court's order denying Local 287's motion to arbitrate, with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety. Costs of IBT and of Local 287 shall be borne by Granite Rock."



## KROLLONTRACK.COM eDISCOVERY CASES

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### **Selecting Your Corporation's E-Discovery Team: Who Will Be in Your Lineup?**

**Michael Sermersheim**

**Former Associate Vice President, Deputy General Counsel, and Industrial Security Supervisor  
University of Akron  
Akron, Ohio**

**Megan Pizor**

**Legal Consultant, Kroll Ontrack Inc.  
Cleveland, Ohio**

Selecting members of your organization's e-discovery team requires as much strategy as a professional baseball coach putting together the most efficient infield or a card player selecting the best hand. As corporate counsel, your insights regarding the strengths of the individuals comprising the company's e-discovery team are imperative in selecting the most effective cadre of members - long before the summons arrives.

The composition of your team will depend on your risk exposure and the size of your company. An effective team, regardless of its size, should be comprised from a representative cross-section of corporate responsibility. A senior management member is essential to stress the importance of the team function to all members of the organization. Other designated individuals should include: legal counsel (inside and outside), records manager, human resources manager, chief information officer, chief financial officer, compliance officer and training professional. In addition, many organizations and

firms are finding value in bringing in outside professionals to assist with e-discovery team responsibilities (e.g., reputable electronic discovery service providers, insurance companies and risk assessment professionals).

Members of the e-discovery team must have knowledge of the existence and location of electronically stored information (ESI), and should understand and appreciate the needs and functions of the enterprise. They should also be effective communicators. Knowledgeable, concerned, articulate team members will be of valuable assistance to counsel in forming a dialogue with employees - stressing the importance of information content, management, authentication and preservation.

Before a lawsuit arises, one of the fundamental purposes of the e-discovery team is to assist with the creation of an inventory and map of your company's records systems (an ESI map). The ESI map is a snapshot to assist counsel in explaining the company, its information resources, information locations, retention and destruction practices and the relative ease of information accessibility. Effective e-discovery team members should be able to assist counsel in making the ESI map a user-friendly, graphical depiction of the information enterprise.

Likewise, e-discovery team members should also understand and inform counsel regarding the use of new forms of communication utilized by employees. This knowledge may be invaluable as counsel reviews the potential legal issues concerning instant messaging, wikis, blogs, social networking sites and other emerging forms of electronic communication. As information locations shift and practices change, e-discovery team members can assist counsel in periodically assess-

## KROLLONTRACK.COM eDISCOVERY CASES

ing the ESI map to ensure accuracy.

E-discovery team members should also have the knowledge to assist counsel in locating and selecting effective witnesses in the event it is necessary to authenticate electronic information.

We all know the challenges placed on witnesses during discovery; witnesses called to authenticate ESI may be challenged just as zealously as other witnesses. Effective e-discovery team members may provide important insight to counsel regarding the knowledge and effectiveness of potential witnesses in providing testimony necessary for electronic records authentication. As such, witnesses must be articulate, knowledgeable and unflappable; counsel may have a tough time identifying custodians with these qualities across a large enterprise. [For a thorough discussion electronic record authentication, see *Lorraine v. Markel American Insurance Co.*, 2007 U.S. Dist. LEXIS 33020 (D. Md. May 4, 2007).]

Though oversight of a records management policy and process is not the fundamental purpose of an e-discovery team, it will become a problem for the team if policies and procedures are not followed by other employees. As a continuing service, the e-discovery team should also have the ability to provide additional insights about whether your company's current records retention and destruction strategies are effective and whether communication and record retention would be better handled through a centralized (enterprise) system.

A solid knowledge of the tasks performed by an e-discovery response team is a key factor in selecting the right people for the team. Not only do you need to consider a representative cross-section of corporate responsibility, but you

should also be cognizant of the team members' abilities to perform the relevant tasks. Selecting the best lineup for your e-discovery team will help your organization knock the next litigation out of the park.

### **Court Imposes Adverse Inference Sanction Based on Culpable Evidence Destruction**

*Babaev v. Grossman*, 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008). In this litigation alleging fraudulent inducement of investments, the plaintiffs sought sanctions claiming the defendants engaged in spoliation of evidence and failed to produce other documents. The defendants argued that some documents were inadvertently corrupted and could not be produced, a "lost" computer was permissibly discarded as unusable prior to the anticipation of litigation and that bank records were not in their control. Dismissing the defendants' arguments, the court determined the relevant computer evidence should have been preserved and was destroyed with a culpable state of mind. The court also held that the defendants possessed sufficient control over their bank records to produce them. For these reasons, the court imposed an adverse inference and awarded the plaintiffs \$5,000 in costs and fees.

### **Court Declines to Impose Default Judgment Sanction Citing Insufficient Degree of Prejudice**

*Nursing Home Pension Fund v. Oracle Corp.*, 2008 WL 4093497 (N.D.Cal. Sept. 2, 2008). In this securities class action, the plaintiffs sought a default judgment or, alternatively, an adverse inference sanction. To support the motion, plaintiffs alleged the defendants: engaged in inadequate preservation efforts after receiving notice

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of the litigation; failed to preserve backup tapes; and failed to preserve transcripts and audio files. Declining to issue default judgment, the court found that the plaintiffs had not demonstrated the degree of prejudice necessary to warrant such sanctions, noting that the alleged misconduct did not "eclipse entirely the possibility of a just result." However, the court issued an adverse inference regarding the failure to preserve and produce e-mails from one of the defendant's files, noting this failure raised questions of authenticity and uncertainty.

### **Court Finds Party's Preservation Failures and Concealment of E-Mails Sanctionable**

*Metrokane, Inc. v. Built NY, Inc.*, 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008). In this litigation surrounding various intellectual property rights, the defendant sought sanctions claiming

the plaintiff failed to produce e-mails the defendant considered highly damaging to the plaintiff. The defendant further argued that the belated discovery hampered its ability to pursue otherwise crucial discovery related to the communications. Opposing the motion, the plaintiff vaguely asserted that the defendant failed to demonstrate any misconduct or prejudice. Additionally, the defendant pointed to its lack of an established written document retention policy, leaving the court to infer that their argument was the e-mails were no longer in its system. Unimpressed with the plaintiff's assertions, the court found the plaintiff was, at the minimum, negligent in failing to preserve and produce the e-mails. In addition, the court found the plaintiff's failure to turn over a specific portion of the e-mails to be intentional concealment. Accordingly, the court ordered an adverse jury instruction and awarded attorneys' fees incurred in bringing this motion.

