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STATE BAR OF NEVADA

Nevada Supreme Court Cases

Stephens Media v. Eighth Judicial Dist. Court, 125 Nev. Adv. Op. No. 63 (December 24, 2009). This petition for extraordinary writ relief challenges the district court's denial of petitioners' motion to intervene in a criminal trial for the limited purpose of accessing juror questionnaires. In reviewing this petition, we must address two issues of first impression. First, we must resolve whether petitioners' motion to intervene in a criminal case to seek access to juror questionnaires is procedurally proper. Second, we are asked to determine whether juror questionnaires used in jury selection are subject to public disclosure. This second inquiry requires an analytical balance between two equally important constitutional rights: the First Amendment right of the public and the press to access criminal proceedings, and the Sixth Amendment right of criminal defendants to receive a fair trial.

After weighing all relevant interests, we conclude that limited intervention by the public or the

press is an appropriate procedural mechanism by which the public or press may assert its First Amendment interests in a criminal case. We determine that the district court committed error in denying petitioners' motion to intervene.

We further conclude that juror questionnaires used in jury selection are, like the jury-selection process itself, presumptively subject to public disclosure.

In re Parental Rights as to N.J., 125 Nev. Adv. Op. No. 62 (December 24, 2009). In this appeal, we resolve questions concerning the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63 (2006). Specifically, we address what evidentiary standards apply in parental termination cases involving the ICWA. We also consider whether the Existing Indian Family (EIF) doctrine, a judicially created exception to the ICWA, applies in those cases in which neither the Native American parent nor the tribe is con-

Public Lawyers Section

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Inside this issue:

<i>Inside Story</i>	2
<i>Inside Story</i>	2
<i>Inside Story</i>	2
<i>Inside Story</i>	3
<i>Inside Story</i>	4
<i>Inside Story</i>	5
<i>Inside Story</i>	6

Nevada Supreme Court Cases

testing termination.

We conclude that a dual-standard burden of proof is appropriate for evidentiary findings in parental termination cases involving the ICWA. Therefore, the higher beyond-a-reasonable-doubt evidentiary standards of the ICWA will be used for ICWA-related findings, and Nevada's clear-and-convincing evidence standard will apply to state law findings. We further hold that under specific circumstances, such as when the breakup of a Native American family is not at issue, application of the EIF doctrine may be appropriate.

late jurisdiction to the district courts in the several judicial districts of the state. Article 6, Section 6(2) permits the Legislature to establish a family court as a division of any judicial district and prescribe its jurisdiction. Acting pursuant to this grant of constitutional authority, the Legislature validly limited the family courts' jurisdiction to the matters specifically enumerated in NRS 3.223. This case involves an unmarried, childless couple, who used to live together and now dispute the ownership of property. Because NRS 3.223 does not give the family courts jurisdiction to adjudicate disputes of this nature, the family court's judgment in this case was



Landreth v. Malik, 125 Nev. Adv. Op. No. 61 (December 24, 2009). In this appeal, we consider the subject matter jurisdiction of the family division of the district court. Article 6, Section 6(1) of the Nevada Constitution grants original and appel-

void and we reverse.

Sanchez v. Wal-Mart Stores, 125 Nev. Adv. Op. No. 60 (December 24, 2009). This appeal raises issues concerning whether a pharmacy

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owes a duty of care to unidentified third parties who were injured by a pharmacy customer who was driving while under the influence of controlled prescription drugs. In addressing this appeal, we consider two main arguments: (1) whether, under common-law principles, pharmacies have a duty to act to prevent a pharmacy customer from injuring members of the general public; and (2) whether Nevada's pharmacy statutory and regulatory laws allow third parties to maintain a negligence per se claim for alleged violations concerning dispensation of prescription drugs and maintenance of customers' records.

We conclude that pharmacies do not owe a duty of care to unidentifiable third parties. Moreover, Nevada's pharmacy statutes and regulations concerning prescription drug dispensation and customer recordkeeping maintenance are not intended to protect the general public from the type of injury sustained in this case, and thus, do not support the appellants' negligence per se claim. We therefore affirm.

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Jurors' Internet Research Could Zap Taser Verdict

Lawyers in Louisville, Ky., are asking a federal judge to set aside a jury verdict exonerating a police officer in a Taser-related death because they say the jury foreman researched the case on the Internet and used what he found to sway other jurors.

In a Dec. 4 verdict, the jury cleared one officer and was unable to reach a verdict on another, [*The Courier-Journal*](#) reports. Attorneys repre-

senting the estate of the victim, Larry Noles, say a juror contacted them and alleged that at least two other jurors, including the foreman, consulted the Web site of [**Taser International**](#).

The juror who called the attorneys later made the same allegations under oath in federal court, saying that both jurors discussed the fact that Taser's Web site claims that Tasers are non-lethal and cannot cause fatal injuries.

The county attorney's office is due to respond Thursday to the request to set aside the verdict. The jury returned its verdict after a three-day trial and two days of deliberations.

"The case is one of a rising number nationally in which jurors have used iPhones, BlackBerrys and home computers to gather and send information about cases, undermining judges and jury trials," writes *Courier-Journal* reporter Andrew Wolfson.

Santa Fe Man Alleges Neighbor's Wi-Fi and Cellphone Threaten His Life

Via this [post](#) on the [FutureLawyer](#) blog, I came across this story of a Santa Fe man who allegedly suffers from "electromagnetic sensitivity" and is now suing his next door neighbor for refusing to turn off her cell phone and her home Wi-Fi. The *Santa Fe New Mexican* [reports](#) that Arthur Firstenberg alleges that he has actually been rendered homeless by his neighbor's rejection of his requests.

Firstenberg alleges that Raphaela Monribot, who lives just 25 feet away from him, refused to turn off the offending phone and Wi-Fi, which Firstenberg says has forced him out of his house. He is

Ninth Circuit Cases



now staying with friends or in his car, he claims. Firstenberg also alleges that he "cannot stay in a hotel, because hotels and motels all employ wi-fi connections," which trigger his "life-threatening" EMS symptoms, including heart arrhythmia. FutureLawyer weighs in that "there is no evidence that WiFi and Cell Phone signals are dangerous; especially to a neighbor next door." He also notes that one of the commenters on a related [post on TechDirt](#) may have the perfect solution: "Just cover your interior walls and windows with steel mesh, and create a [Faraday cage](#)" (pictured above).

Ninth Circuit Cases

Crowe v. Wisley, No. 05-55467 (January 14, 2010). This civil rights case arose from the investigation and prosecution of innocent teenagers for a crime they did not commit. Michael Crowe, Aaron Houser, and Joshua Treadway were wrongfully accused of the murder of Michael's 12-year-old sister Stephanie Crowe. After hours of grueling, psychologically abusive interrogation—during which the boys were isolated from their families and had no access to lawyers—the boys were indicted on murder charges and pre-trial proceedings commenced.

A year later, DNA testing revealed Stephanie's blood on the shirt of a transient, Richard Tuite, who had been seen in the Crowes' neighborhood on the night of the murder and reported by several neighbors for strange and harassing behavior. The shirt had been collected as part of the initial investigation, but never fully tested. Charges against the boys were eventually dropped, and Tuite was convicted of Stephanie's murder.

Michael, Aaron, Joshua, and their families filed a complaint against multiple individuals and government entities who had been involved in the investigation and prosecution of the boys. The complaint alleged, amongst other claims, constitutional violations under the Fourth, Fifth, and Fourteenth Amendments, and defamation claims. In two separate orders, the district court granted summary judgment in favor of the defendants as to the majority of the plaintiffs' claims. The Crowes and the Housers now appeal the bulk of those orders and several defendants cross-appeal the district court's denial of summary judgment on qualified immunity grounds as to several claims. We affirm in part and reverse in part.

Clouthier v. County of Contra Costa, No. 07-16703 (January 14, 2010). The plaintiffs in this appeal brought an action under 42 U.S.C. § 1983 alleging that a mental health specialist, two sheriff's deputies, and the County of Contra Costa violated the Fourteenth Amendment due process rights of their son, Robert Clouthier, by failing to prevent his suicide while he was in pretrial detention. The district court granted summary judgment in favor of the defendants. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's grant of summary judgment as to the two deputies and the County, but we re-

NINTH CIRCUIT CASES

verse as to the mental health specialist because there are genuine issues of material fact as to whether she was deliberately indifferent to a substantial risk of serious harm to Clouthier.

Mattos v. Agarano, No. 08-15567 (January 12, 2010). Maui police officers Darren Agarano, Halayudha MacKnight, Stuart Kunioka, and Ryan Aikala appeal the district court's order denying their motion for summary judgment on the basis of qualified immunity in this § 1983 action. The district court ruled that material questions of fact existed as to whether the officers' use of a Taser gun against plaintiff Jayzel Mattos was constitutionally reasonable and summary judgment was therefore inappropriate. Because we conclude that, even taking the facts in the light most favorable to the plaintiffs, the defendant officers did not violate Jayzel's constitutional rights, we reverse the judgment of the district court.

Elliot-Park v. Manglona, No. 08-16089 (January 12, 2010). We consider whether law enforcement officers who are accused of failing to investigate a crime or make an arrest due to the race of the victim and that of the perpetrator are entitled to qualified immunity.

It's been long established that state employees can't treat individuals differently on the basis of their race. The three officers thus had a more than fair warning that failure to investigate and arrest Babauta because of race violated equal protection.

United States v. Pineda-Moreno, No. 08-30385 (January 11, 2010). We must decide whether law enforcement officers violate a suspect's Fourth Amendment rights when they enter the curtilage of his home and attach a mobile track-

ing device to the undercarriage of his car.

We conclude that the police did not conduct an impermissible search of Pineda-Moreno's car by monitoring its location with mobile tracking devices.

United States v. Mausall, No. 08-50062 (January 11, 2010). We hold today, as have the Second, Third, and Eighth Circuits, that a defendant waives his claim of outrageous government conduct of which he is aware if he fails to assert it in a pretrial motion to dismiss. In this case, the defendant failed to raise outrageous government conduct before the district court prior to trial, during trial, or even after trial, despite knowing the facts supposedly supporting his claim months before trial began. Accordingly, he has waived this issue for purposes of appeal. We affirm.

Farrakahn v. Gregoire, No. 06-35669 (January 5, 2010). Plaintiffs, minority citizens of Washington state who have lost their right to vote pursuant to the state's felon disenfranchisement provision, filed this action in 1996 challenging that provision on the ground that, due to racial discrimination in the state's criminal justice system, the automatic disenfranchisement of felons results in the denial of the right to vote on account of race, in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973. We earlier reversed the district court's grant of summary judgment to Defendants. *See Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *cert. denied*, 543 U.S. 984 (2004). On remand, the district court again granted summary judgment to Defendants. Plaintiffs timely appeal. We reverse and grant summary judgment to Plaintiffs.

Harrison v. Gillespie, No. 08-16602 (January 5, 2010). A jury may have acquitted James Harrison of the death penalty. We will never know, be-

NINTH CIRCUIT CASES

cause the trial court denied his request to ask the jury two simple questions that could have conclusively established that fact, and instead dismissed the jurors. Now, the State of Nevada seeks once again to have him executed. Harrison asserts that a retrial on the death penalty would violate the Double Jeopardy Clause.

cumstances and (2) whether they had unanimously found that the mitigating circumstances outweighed the aggravating circumstances. If the answer to either of the questions had been yes, the poll would have established that Harrison had been acquitted of the death penalty, and the Double Jeopardy Clause of the Fifth



The jury reported its inability to agree on a sentence, and two juror notes indicated that the jury was deadlocked between life with the possibility of parole and life without the possibility of parole. Harrison requested that the members of the jury be polled to determine (1) whether they had unanimously found that there were no aggravating cir-

Amendment would have prohibited the State from seeking that penalty during Harrison's sentencing retrial. However, the prosecution objected to Harrison's request, and trial judge denied it. She then dismissed the jury and declared a mistrial.

We conclude that there was no manifest neces-

NINTH CIRCUIT CASES

sity to declare a mistrial without first polling the jury in order to determine whether Harrison had been acquitted of the death penalty. Accordingly, we hold that the trial court abused its discretion by denying Harrison's polling request. Because no other alternative would adequately protect Harrison's rights under the Double Jeopardy Clause, we further hold that the State may not seek the death penalty at a sentencing retrial, and no such penalty may be imposed by the court.

Caviness v. Horizon Cmty. Learning Center, Inc., No. 08-15245 (January 4, 2010). This appeal requires us to decide whether a private non-profit corporation that runs a charter school in Arizona was a state actor under 42 U.S.C. § 1983 when it took certain employment-related actions with respect to a former teacher, Michael Caviness. The district court held that Horizon Community Learning Center and its executive director, Lawrence Pieratt, were not functioning as state actors in these circumstances. Because the allegations in Caviness's complaint are insufficient to raise a reasonable inference that Horizon was a state actor and thus acted under color of state law in taking the alleged actions after Caviness was terminated, we affirm the judgment of the district court.

Birdsong v. Apple, Inc., No. 08-16641 (December 30, 2010). Plaintiffs-appellants Joseph Birdsong and Bruce Waggoner filed a class action complaint claiming that defendant-appellee Apple, Inc.'s iPod is defective because it poses an unreasonable risk of noise-induced hearing loss to its users. The plaintiffs appeal the district court's dismissal of their third amended complaint. The district court determined that the plaintiffs failed to state claims for breach of the implied warranty of merchantability and fitness for a particular purpose, and that they lacked standing to assert a

claim under California's Unfair Competition Law.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

United States v. No Runner, No. 08-30449 (December 30, 2009). Journey Marie No Runner appeals from a pretrial order finding her competent to stand trial. Because a pretrial competency determination is a non-final order and the collateral order doctrine does not apply, we dismiss her appeal for lack of jurisdiction.

Bryan v. MacPherson, No. 08-556 (December 28, 2009). Early one morning in the summer of 2005, Officer Brian McPherson deployed his taser against Carl Bryan during a traffic stop for a seatbelt infraction. Bryan filed this action under 42 U.S.C. § 1983, asserting excessive force in violation of the Fourth Amendment. Officer McPherson appeals the denial of his motion for summary judgment based on qualified immunity. We affirm the district court because, viewing the circumstances in the light most favorable to Bryan, Officer McPherson's use of the taser was unconstitutionally excessive and a violation of Bryan's clearly established right.

There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer McPherson and, according to Officer McPherson, was standing twenty to twenty-five feet away and not attempting to flee. Officer McPherson testified that he told Bryan to remain in the car, while Bryan testified that he did not hear Officer McPherson tell him to do so. The one material dispute concerns whether Bryan made any

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movement toward the officer. Officer McPherson testified that Bryan took “one step” toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer McPherson. Without giving any warning, Officer McPherson shot Bryan with his taser gun. One of the taser probes embedded in the side of Bryan’s upper left arm. The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions. Bryan’s morning ended with his arrest and yet another drive—this time by ambulance and to a hospital for treatment.

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Court Finds Privilege Waived Due to Communication Using Company E-Mail Address and Computer

Alamar Ranch, LLC v. County of Boise, 2009 WL 3669741 (D. Idaho Nov. 2, 2009). In this Fair Housing Act lawsuit, the non-party’s attorney requested the return of privileged documents obtained through the plaintiff’s previous subpoena. The privileged information included e-mails sent to the non-party attorney from one of his clients via her work e-mail address. The plaintiff argued that any privilege was waived on account of the company’s privacy policy, which included the right to review and disclose all electronic messages created. Using a four-part balancing test that balanced the expectation of privacy against the lack of confidentiality, the court found that the company placed all employees on notice that e-mails would become the employer’s property. The court also noted that the client’s apparent lack of awareness of the privacy policy was unreasonable “in this technological age” and that the client’s e-mail address itself clearly put the non-party attorney on

notice of a potential issue of confidentiality. Thus, the court determined privilege was waived with respect to the e-mails sent using the client’s work e-mail account.

Court Determines Voluntary Disclosure of Work Product Constitutes Subject Matter Waiver Under Fed.R.Evid. 502

Chick-Fil-A and CFA-NC Townridge Square, LLC v. ExxonMobil Corp., 2009 WL 3763032 (S.D. Fla. Nov. 10, 2009). In this environmental litigation, the plaintiffs sought production of all work product-protected documents related to the subject matter of a privileged memorandum that the defendant voluntarily produced. Following the court’s determination that the defendant’s intentional, voluntary disclosure to the plaintiffs waived the work product protection, the defendants argued that the waiver’s scope should be limited to the information actually disclosed. Turning to Fed.R.Evid. 502(a), the court determined that disclosure of work product results in a subject matter waiver only if the additional materials “ought in fairness to be considered together” with the memorandum. Finding a subject matter waiver to be warranted, the court relied on federal case law, interpreting Rule 502(a) to determine that subject matter waiver was limited to fact work product. Therefore, the court granted the plaintiffs’ motion in this respect and ordered the defendant to produce fact work product materials.

Court Orders Restoration of One Backup Tape Following Evidence Destruction

Calixto v. Watson Bowman Acme Corp., 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009). In this tortious interference of a contract suit, the

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plaintiff alleged the defendant "spoliated electronic documents in the face of ongoing litigation." As such, the plaintiff sought an order requiring the defendant to obtain and fund a restoration and search of its 37 backup tapes. The defendant argued the backup tapes were not reasonably accessible and that no further relevant evidence existed on the tapes as a litigation hold was in effect. Finding the plaintiff failed to establish a reasonable expectation that the benefit of restoring the backup tapes would outweigh the burden, the court declined to impose the significant costs to restore, search and review the tapes on the defendant. The court also declined to impose sanctions because no bad faith existed regarding the defendant's IT employee's deletion of an e-mail box as part of a regular practice. However, the court concluded one of the backup tapes may contain discoverable records because it was unclear when the e-mail box deletion occurred and ordered the tape's restoration and search.

Court Finds Term "Native Format" Unambiguous and Orders Reproduction of Electronic Documents

Cenveo Corp. v. S. Graphic Sys., 2009 WL 4042898 (D. Minn. Nov. 18, 2009). In this discovery dispute, the defendants filed an amended motion to compel disclosure following the plaintiff's failure to produce electronic files in native format. The plaintiff argued that its production of the documents in PDF format fulfilled Fed.R.Civ.P. 34(b)'s "reasonably usable" requirement because the defendants failed to define "native format." Citing numerous cases, the court found that "native format" is not an ambiguous term. Although some native format production requests may be "overbroad and unduly burdensome," the responding party must object and specify the alternative form it intends to use. Be-

cause the plaintiff failed to make an objection, the court granted the defendants' motion and ordered the plaintiff to reproduce electronic documents in native form.

Failure to Preserve Maintenance Log Does Not Warrant Spoliation Sanctions

Mohrmeyer v. Wal-Mart Stores E., L.P., 2009 WL 4166996 (E.D. Ky. Nov. 20, 2009). In this "slip and fall" personal injury action, the plaintiff sought sanctions against the defendant based on alleged spoliation of certain materials including surveillance video and a restroom maintenance log. The defendant argued the log was destroyed in the routine course of business long before it was made aware of the possibility of litigation. Relying on Fed.R.Civ.P. 37(e), the court found imposing sanctions on the defendant would be inappropriate because the evidence was destroyed as a result of routine, good-faith records management practices long before the defendant received any notice of the likelihood of litigation. Thus, the court denied the plaintiff's motion for sanctions and admonished the plaintiff's lack of inquiry of relevant facts prior to seeking such serious sanctions

Court Holds Inadvertent Disclosure of Privileged E-Mail via "Autofill" Feature Does Not Constitute Waiver

Multiquip, Inc. v. Water Mgmt. Sys. LLC, 2009 WL 4261214 (D. Idaho Nov. 23, 2009). In this dispute, the defendants moved to exclude the plaintiff's use of a privileged e-mail obtained after one defendant inadvertently included a third party via the "autofill" feature. The third party then passed the e-mail chain to the plaintiff's counsel. After discovering the mistake, the defendants requested return of the e-mail, which

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the plaintiff denied claiming Fed.R.Civ.P. 26(b)(5)(B) only applied to documents turned over in discovery. Using Fed.R.Evid. 502(b) to determine whether disclosure constituted a waiver, the court determined that the disclosure was inadvertent, that the defendants took reasonable steps to prevent disclosure because reliance on the "autofill" feature was not unreasonable and that the defendants acted promptly to rectify the error. Based on this analysis, the court found privilege was not waived and granted the defendants' motion to exclude the privileged information.

Court Orders Production of Forensic Copies of Hard Drives Citing Defendants' Previous Defiance and "Lackadaisical" Approach to Discovery

Bennett v. Martin, II, 2009 WL 4048111 (Ohio App. 10 Dist. Nov. 24, 2009). In this employment dispute, the defendants appealed the trial court's judgment requiring production of forensic copies of their computer hard drives to the plaintiff. The trial court concluded that the forensic imaging was a reasonable solution "given defendants' consistent intransigence to providing discovery materials." On appeal, the court noted privacy and confidentiality concerns must be weighed, but the "scales tip in favor" of compelling forensic imaging when the requesting party can demonstrate discovery failures or discrepancies. The court found the defendants engaged in outright defiance of court orders and "adopted a lackadaisical and dilatory approach to providing discovery." Based on the defendants' misrepresentations, willful disregard of discovery rules and history of noncompliance with court-ordered discovery requests, the court determined the trial court did not abuse its discretion in ordering production of forensic copies.

Court Finds Defendants "Forfeited" Forensic

Examination Opportunity by Engaging in Ex Parte Communication with Independent Expert

G.K. Las Vegas L.P. v. Simon Prop. Group, Inc., 2009 WL 4283086 (D. Nev. Nov. 30, 2009). In this business litigation, the defendants previously requested case dismissal and sanctions based on the plaintiffs' alleged spoliation of evidence. Due to the defendants' failure to demonstrate that electronic evidence was destroyed and no longer available, the motion was dismissed without prejudice. However, the court ordered a forensic examination of the plaintiffs' computer equipment by a court-appointed independent computer forensics expert. Upon learning of the defendants' ex parte communications with the independent expert during the imaging process, the plaintiffs moved to have the forensic examination order vacated and the spoliation motion modified to dismissal with prejudice. The defendants claimed that the expert was not court-appointed but was instead a "party retained independent expert." Finding the intent to enlist a court-appointed, independent expert blatantly clear in the record and subsequent agreement, the court determined the defendants "forfeited their opportunity to obtain an independent forensic examination" and granted the plaintiffs' motions.

