

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Great Basin Water Network v. State Eng’r, 126 Nev. Adv. Op. No. 20 (June 17, 2010) We conclude that the State Engineer violated his statutory duty by ruling on applications well beyond the one-year statutory limitation without first properly postponing action. Therefore, the district court erred in denying appellants’ petition for judicial review. In the absence of a statutory remedy for noncompliance with the timing requirements of NRS 533.0, we must determine the proper remedy. Both parties posit that a proper remedy may be that the State Engineer should re-notice and reopen the protest period.

We have previously recognized the district court’s power to grant equitable relief when water rights are at issue. See, e.g., *Engelmann v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982); *State Engineer v. American Nat’l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972). Additionally, in *Bailey v. State of Nevada*, a water permit cancellation case, this court expanded the equitable relief

granted by the district court, impliedly recognizing our ability also to award equitable relief. 95 Nev. 378, 383, 594 P.2d 734, 737 (1979). We take this opportunity to confirm that this court has the power to grant equitable relief in water law cases.

Voiding the State Engineer’s ruling and preventing him from taking further action would be inequitable to SNWA and future similarly situated applicants. And applicants cannot be punished for the State Engineer’s failure to follow his statutory duty. Similarly, it would be inequitable to the original and subsequent protesters to conclude that the State Engineer’s failure to take action results in approval of the applications over 14 years after their protests were filed. Thus, we cannot conclude that the State Engineer’s inaction deems the applications either approved or rejected. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (stating that “‘if a statute does not specify a consequence for noncompliance with

Public Lawyers Section

June 2010



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

statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction” (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)).

Instead, we conclude that, in circumstances in which a protestant filed a timely protest pursuant to NRS 533.365 and/or appealed the State Engineer’s untimely ruling, the proper and most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest period. Accordingly, we reverse the district court’s order denying appellants’ petition for judicial review and remand the matter to the district court with instructions to, in turn, remand the matter to the State Engineer for further proceedings consistent with this opinion.

Polk v. State, 126 Nev. Adv. Op. No. 19 (June 3, 2010) In this appeal, we have the duty to publicly reiterate the importance of submitting attentive appellate briefs and the unfortunate obligation to address the unforgiving consequences resulting from a respondent’s failure to respond to relevant issues raised on appeal. In his opening brief, appellant Levenral Polk argues that his constitutional right to confrontation under the Sixth Amendment of the United States Constitution and *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009), was violated when the findings of a gunshot residue analyst who did not testify at trial and was not subject to cross-examination were admitted. In its answering brief, the State failed to directly address the *Crawford* and *Melendez-Diaz* issue or argue, alternatively, that any potential constitutional violation was harmless error. Polk argues in his reply that because the State failed to respond to Polk’s alleged constitutional violation, it effectively confessed error under NRAP 31(d). We agree and reverse and remand for a new trial.

Marvin v. Fitch, 126 Nev. Adv. Op. No. 18 (May 27, 2010) In this appeal, we consider the application of absolute immunity to individual members of the State Board of Equalization (State Board). Absolute immunity is a broad immunity that is granted sparingly to individuals performing judicial or quasi-judicial functions. *State of Nevada v. Dist. Ct. (Ducharm)*, 118 Nev. 609, 615-16, 55 P.3d 420, 423-24 (2002). On appeal, appellants Charles Marvin, Gary Taylor, and 400 Tuscarora Road, LLC (collectively, the Taxpayers), argue that the members of the State Board do not qualify for absolute immunity because the State Board refused to perform its duty of equalizing property valuations throughout the state pursuant to NRS 361.395.[2] We disagree and conclude that the State Board is performing a quasi-judicial function when determining whether to equalize property valuations, and its members therefore have absolute immunity.

Betsinger v. D.R. Horton, Inc., 126 Nev. Adv. Op. No. 17 (May 27, 2010) In this opinion, we consider the proper burden of proof that should apply for a cause of action brought under NRS Chapter 598’s deceptive trade practices statutory scheme. We conclude that any cause of action for deceptive trade practices under NRS Chapter 598 must be proven by a preponderance of the evidence. We further conclude that a substantial portion of Steven Betsinger’s compensatory damage award must be reversed because he failed to present evidence of any physical manifestation of emotional distress. As a consequence of this decision, we reverse the punitive damages award against Daniel Callahan because Betsinger failed to recover any general damages against Callahan aside from damages for emotional distress. Additionally, we remand for a new trial on punitive damages against DHI Mortgage Company, Ltd., because

Krollontrack.com

we are unable to adequately review the jury's punitive damages award in light of our decision to substantially reduce the compensatory damages award.

Thomas v. Hardwick, 126 Nev. Adv. Op. No. 16 (May 27, 2010) Bobbie Thomas appeals from a judgment entered on a defense verdict in her wrongful death suit against Dr. Wayne Hardwick, his practice group, and Washoe Medical Center. Her suit alleges that medical malpractice led to her husband's preventable heart attack and death two weeks after Dr. Hardwick saw him for chest pain complaints in WMC's emergency room. On appeal, Thomas asserts that errors by the trial court in managing voir dire, admitting certain evidence, and not imposing meaningful sanctions on WMC for its negligent loss of evidence deprived her of a fair trial. Separately, she appeals the trial court's dismissal on statute-of-limitations grounds of the amended complaint by which her daughter, Brandi, sought to join the suit as an additional named plaintiff.

Not all the errors claimed are properly before this court. Those that are permit reversal and a new trial only if an abuse of discretion affecting substantial rights is shown. Because that showing has not been made, we affirm.

Krollontrack.com

Court Orders Production of Foreign Documents Despite French Blocking Statute

In re Air Cargo Shipping Servs., M.D.L. No. 1775 (E.D.N.Y. Mar. 29, 2010). In this anti-trust litigation, the plaintiffs moved to compel production of documents withheld by the defendant on the grounds that production is prohibited by the French blocking statute. The de-

fendant argued the plaintiffs should be required to obtain the documents pursuant to the Hague Convention procedures. Citing to the Restatement (Third) of Foreign Relations Law of United States, the court ultimately decided the fifth factor – the balance of the national interests at play – weighed in favor of the plaintiff, since “France’s relatively weak national interest in prohibiting disclosure...[was] outweighed by the more substantial United States interests.” The court also considered the hardship of compliance factor, finding there was little proof provided that the defendant would face prosecution for violating the blocking statute. Finally, the court ordered production of the documents since resorting to the Hague Convention process would cause substantial delay, which the court deemed “pointless.”

Finding “Bigger Fish to Fry,” Court Denies Request for Reproduction in Native Format

Covad Commcns Co. v. Revonet, Inc., 2010 WL 1233501 (D.D.C. Mar. 31, 2010). In this ongoing secrets misappropriation litigation, the court considered six of nine discovery motions both parties had filed. In particular, the court addressed the plaintiff's motion to compel production of 35,000 e-mails in native file format including metadata, following the defendant's production of those e-mails as hard-copy printouts. Addressing this motion, the court noted that it was bound by Fed.R.Civ.P. 26(b)(2)(C)(iii), which requires a limit of discovery if “the burden or expense of the proposed discovery outweighs its likely benefit” and explained that the parties had “bigger fish to fry” in the interest of judicial expediency. Based on this and the plaintiff's failure to demonstrate a specific need for the e-mail metadata, the court held that the production of the hard copies in native format in this stage of the dispute was not necessary and denied the plaintiff's motion.

Krollontrack.com

Counsel's Failure to Understand Computer and Archive Systems Results in Production Delay, Monetary Sanctions

In re A & M Florida Props. II, 2010 WL 1418861 (Bkrcty.S.D.N.Y. Apr. 7, 2010). In this bankruptcy litigation, the defendant sought sanctions alleging the plaintiffs and their counsel intentionally obstructed the discovery process by causing misunderstandings and by delaying the production of relevant e-mails, which resulted in "needless costs and frustrations." The plaintiffs eventually produced more than 9,500 e-mails that were stored in the company archive system following two forensic searches. Based on the absence of intentional destruction and the fact that the sought-after e-mails were ultimately produced, the court noted that dismissal or an adverse inference would be "unjustly harsh." However, the court found that the plaintiffs' counsel "did not understand the technical depths to which electronic discovery can sometimes go" and noted that counsel has an obligation to search for sources of information to understand where data is stored. According to the court, if the plaintiffs' counsel would have spoken with key figures at the company regarding the computer and archiving systems in place, the forensic search and subsequent motions would have been unnecessary. As such, the court found monetary sanctions to be appropriate.

Court Finds "Courtesy" Is Not Synonymous With "Agreement" Regarding Privilege

Cnty. Bank v. Progressive Cas. Ins. Co., 2010 WL 1435368 (S.D.Ind. Apr. 8, 2010). In this insurance litigation, the plaintiff requested a protective order to prevent the defendant's use of privileged material and work product inadvertently disclosed by a non-party as evidence in a summary judgment motion. Although the plaintiff had previously returned privileged docu-

ments inadvertently sent to the defendant on numerous occasions, the court found the defendant's assurances that it would afford the plaintiff the same courtesy were "too amorphous to be binding." The use of the word "courtesy" instead of "agreement" in the parties' communications demonstrated that the expected reciprocal conduct was moral in nature, not a legal right, and the communications did not reference applicability to non-parties. Citing Fed.R.Evid. 502(b), the court also found the plaintiff took no reasonable precautions to prevent the disclosure since no supervision of the non-party's production occurred. However, the court determined the defendant violated Fed.R.Civ.P. 26(b)(5) by using the privileged exhibits in its summary judgment motion prior to resolution of the dispute. Based on this behavior, the court ordered the defendant to pay one-half of the plaintiff's fees and costs associated with the motion and prohibited use of the exhibits as substantive evidence.

Court Rules Government's Search and Seizure of Electronic Evidence Appropriate

United States v. Sedaghaty, 2010 WL 1490306 (D.Or. Apr. 13, 2010). In this criminal case, the defendant moved to suppress electronic evidence and prevent additional searching of nine computer hard drives seized and copied during the execution of a search warrant. Citing , the defendant argued the government exceeded the warrant's scope by searching the computer hard drive. Acknowledging the importance of the cited case, the court noted that the warrant and seizure in this case predated the decision, which was not intended to be applied retroactively. Finding the procedure utilized was consistent with pre-existing case law, the court determined appropriate search terms were used that were reasonably related to the items described in the warrant. The court also noted that government

Krollontrack.com

exercised care in this case that exceeded what is required given the nature of white collar crimes and denied the defendant's motion to suppress.

Court Applies Reasonableness Standard to Tackle the “Mysteries of Keyword Search Techniques

Eurand, Inc. v. Mylan Pharm., Inc., 2010 WL 1458442 (D.Del. Apr. 13, 2010). In this patent litigation, the defendants sought further discovery arguing the plaintiffs failed to disclose pertinent information and requested disclosure of search terms used. Maintaining that a comprehensive search of all relevant files was performed, the plaintiffs argued that the defendants' motion was a “back door” effort to obtain information previously denied by the court. Noting that the defendants' arguments forced the court into “mysteries of keyword search techniques [and] the efficacy of various methods used to search electronically stored information,” the court acknowledged that “[n]either lawyers nor judges are generally qualified” to evaluate the adequacy of keyword search terms. Despite this, the court employed a reasonableness test to determine whether the search performed was adequate, or “could... have been expected to produce the information requested.” While the plaintiffs' search appeared adequate, it may not have included evidence of subjective intent, and thus limited, additional e-mail searching was warranted. The court also declined to order disclosure of the search terms used.

Trial Court's E-Discovery Orders Deemed Abuse of Discretion

In re Art Harris, 2010 WL 1612205 (Tex.App. Apr. 22, 2010). In this defamation litigation, the defendant filed a petition for writ of mandamus requesting withdrawal of the trial court's dis-

covery orders. The defendant argued that the trial court abused its discretion by compelling production of electronic media for forensic examination, by refusing to apply applicable state rules regarding treatment of privileged documents and privilege logs, and by appointing a special master. Addressing the defendant's arguments, the court found the trial court acted arbitrarily and without considering the Texas Rules of Civil Procedure by compelling discovery from the defendant without requiring identification of specific requests, by failing to hold a hearing on the defendant's protective order motion, by failing to consider whether privilege applied and in ordering production absent a motion to compel. The court also found that the trial court erred by ordering the defendant to produce his hard drives contrary to the provisions of Rule 196.4 as discussed in *In re Weekley Homes*. Finally, the court noted that e-discovery is a “common component of modern litigation” and does not by presence alone require a special master. Since the case did not require specialized knowledge, the trial court also abused its discretion by appointing a special master.

Court Finds Failure to Preserve Evidence Including Text and Skype Messages Warrants a \$10,000 Sanction

Passlogix, Inc. v. 2FA Tech., 2010 WL 1702216 (S.D.N.Y. Apr. 27, 2010). In this licensing agreement litigation, the plaintiff sought sanctions through an adverse inference instruction, preclusion and costs, alleging the defendants failed to implement a litigation hold and spoliated electronic evidence. Despite admitting to the deletion of the e-mails, text messages, Skype messages, and network and computer logs, the defendants denied the relevance of the electronic evidence to the pending case. Addressing the spoliation, the court reiterated that a litigation hold must be put

Krollontrack.com

in place and routine document retention/destruction policies must be suspended, which the defendants failed to accomplish. The court found the failure to preserve e-mails and text and Skype messages constituted gross negligence while the failure to preserve computer logs was intentional. Balancing the defendants' "litigation conduct with its status as a small corporation," the court determined that a \$10,000 monetary fine was the appropriate remedy.

Litigation Minute: Metadata Significance & Preservation Practices

Metadata can be a valuable litigation and internal investigation tool, as it can be used to provide key pieces of relevant evidence and information. Metadata may also help establish or discount elements of a legal claim or defense, and serves to authenticate evidence at trial. Unfortunately, like other forms of ESI, it implicates a variety of new concerns that are not clearly addressed by the Federal Rules of Civil Procedure. Despite this lack of guidance, several past court decisions note that metadata may be discoverable and that parties have the same obligation to preserve metadata as with other forms of evidence.

Based on the obligation to preserve evidence, parties must exercise caution to avoid spoliation of metadata or risk facing sanctions. Changes to metadata may occur in several different scenarios, including:

- Accessing files
- Copying (drag and drop)
- Changing creation and last accessed dates
- Burning to CD or DVD
- Losing or truncating original path
- Forwarding e-mail messages
- Moving data between different operating systems

To help prevent metadata spoliation, develop and implement your client's metadata preservation plan before the data collection begins. If you are unsure which metadata fields should be preserved, collected, reviewed and produced, seek clarification from the opposing party or the court. Counsel should also document all the steps taken to preserve this delicate evidence, in the event the opposing party brings a motion for spoliation sanctions. It is important to remember that spoliation concerns related to metadata may also arise in review and production. Thus, continue the established protocol developed to address metadata throughout the e-discovery process as necessary.

Metadata that is properly preserved can help uncover information about a particular case, and can help authenticate and interpret evidence by providing date and time stamps, network access logs, evidence of simultaneous user activity, version control information and more. Use metadata to your advantage, engaging the services of an expert when needed. An expert can testify about how metadata verifies the credibility of an electronic document, and can also help the judge or jury understand, interpret and evaluate the relationship between a piece of evidence and its associated metadata.

As noted in , 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008), "[m]etadata is not addressed directly in the Federal Rules of Civil Procedure but is subject to the general rules of discovery."



NINTH CIRCUIT CASES

Murdoch v. Castro, No. 05-55665 (June 21, 2010) Charles Murdoch was convicted of murder in California state court. Before trial, the prosecutor informed the court that a prosecution witness and participant in the crime had written a letter to his attorney claiming that Murdoch was not involved in the crime and that the witness had been coerced into implicating Murdoch. The state court ruled that Murdoch could not have access to the letter because it was protected under California's attorney-client privilege. In order to determine whether Murdoch is entitled to habeas relief, we must decide whether, under "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), the Confrontation Clause of the Sixth Amendment of the United States Constitution compelled the release of the letter to Murdoch in spite of the attorney-client privilege.

Guy v. City of San Diego, No. 08-56024 (June 17, 2010) Anthony Guy appeals the district court's denial of his motion for a new trial on damages following a jury verdict that was reached in his 42 U.S.C. § 1983 action. The jury concluded that police officer David Maley used excessive force when he detained Guy during a late-night confrontation, but the jury awarded only nominal damages, and that prompts Guy's appeal seeking a new trial solely on damages. Guy also appeals the district court's decision not to award him attorney's fees and nontaxable costs as the prevailing party in the lawsuit. We conclude that substantial evidence supported the jury's damages verdict, but we reverse the district court's decision not to award costs and attorney's fees.

Blair v. Bethel School Dist., No. 08-35895 (June 14, 2010) Ken Blair maintains his First Amendment rights were violated when his fellow school board members voted to remove him as their vice

president because of his relentless criticism of the school district's superintendent. The district court disagreed, and so do we. To be sure, the First Amendment protects Blair's discordant speech as a general matter; it does not, however, immunize him from the political fallout of what he says.

United States v. Bonds, No. 09-10079 (June 11, 2010) In 2001, Barry Bonds hit 73 home runs for the San Francisco Giants. Also in 2001, as well as in prior and succeeding years, BALCO Laboratories, Inc. in San Francisco recorded, under the name "Barry Bonds," positive results of urine and blood tests for performance enhancing drugs. In 2003, Bonds swore under oath he had not taken performance enhancing drugs, so the government is now prosecuting him for perjury. But to succeed it must prove the tested samples BALCO recorded actually came from Barry Bonds. Hence, this appeal. The government tried to prove the source of the samples with the indisputably admissible testimony of a trainer, Greg Anderson, that Barry Bonds identified the samples as his own before giving them to Anderson, who took them to BALCO for testing. Anderson refused to testify, however, and has been jailed for contempt of court.

The government then went to Plan B, which was to offer the testimony of the BALCO employee, James Valente, to whom Anderson gave the samples. Valente would testify Anderson brought the samples to the lab and said they came from Barry Bonds. But the district court ruled this was hearsay that could not be admitted to establish the truth of what James Valente was told. *See* Fed. R. Evid. 802. Accordingly we have this interlocutory appeal by the United States seeking to establish that the Anderson

NINTH CIRCUIT CASES

statements fall within some exception to the hearsay rule.

The district court also ruled that because Anderson's statements were inadmissible, log sheets on which BALCO recorded the results of the testing under Bonds' name, were also inadmissible to prove the samples were Bonds'. The government challenges that ruling as well.

We have jurisdiction pursuant to 18 U.S.C. § 3731 which authorizes government interlocutory appeals of adverse evidentiary rulings. We review for abuse of discretion and affirm.

ordinance against a constitutional challenge.

See *ACORN v. City of Phoenix*, 798 F.2d 1260, 1273 (9th Cir. 1986). We reach the same result here and hold that the Redondo Beach ordinance is a valid time, place, or manner restriction. Accordingly, we reverse the contrary decision of the district court.

Pollard v. The GEO Group, Inc., No. 07-16112 (June 7, 2010) Plaintiff-Appellant Richard Lee Pollard, a federal inmate, appeals the district court's order dismissing his Eighth Amendment claims against employees of a pri-



Comite de Jornelos de Redondo Beach v. City of Redondo Beach, No. 06-55750 (June 9, 2010)

This appeal raises a First Amendment challenge to Redondo Beach Municipal Code § 3-7.1601, which prohibits the act of standing on a street or highway and soliciting employment, business, or contributions from the occupants of an automobile. We have previously upheld a virtually identical

vate corporation operating a federal prison under contract with the Bureau of Prisons. This appeal presents the question of whether the implied damages action first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), allows a federal prisoner to recover for violations of his constitutional rights by employees of private corporations operating federal prisons. We

NINTH CIRCUIT CASES

conclude that it does.

United States v. Aerojet General Corp., No. 08-55996 (June 2, 2010) The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, requires certain polluters to pay for cleaning up contaminated sites. After identifying a contaminated site, the federal Environmental Protection Agency and state environmental agencies typically negotiate with potentially responsible parties over their shares of comparative responsibility for cleanup costs. CERCLA allows PRPs to seek contribution from one another in order to apportion response costs equitably. But CERCLA bars contribution claims against PRPs that have obtained administratively or judicially approved settlements with the government. CERCLA thus provides an incentive for PRPs to settle by leaving non-settling PRPs liable for all of the response costs not paid by the settling PRPs.

We consider a question that has split the federal courts: May a non-settling PRP intervene in litigation to oppose a consent decree incorporating a settlement that, if approved, would bar contribution from the settling PRP? We join the Eighth and Tenth Circuits in holding that the answer is “yes.”

Harvey v. Brewer, No. 08-17253 (May 27, 2010) Arizona’s Constitution provides: “No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.” Ariz. Const. art. VII, § 2. Arizona statutes give effect to this constitutional provision by suspending the voting rights of any person convicted of a felony, Ariz. Rev. Stat. § 13-904(A)(1), and automatically restoring those rights to any person

convicted of only one felony, provided he: “1. Completes a term of probation or receives an absolute discharge from imprisonment,” and “2. Pays any fine or restitution imposed.” Ariz. Rev. Stat. § 13-912(A).

Plaintiffs brought suits challenging Arizona’s disenfranchisement scheme. Their first argument was that disenfranchisement for felonies not recognized as such at common law violates the Equal Protection Clause of the Fourteenth Amendment. While plaintiffs acknowledged that Section 2 of the Fourteenth Amendment insulates felon-disenfranchisement schemes from equal protection challenges to some extent, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), they argued that Section 2 only permits disenfranchisement for common-law felonies. In their view, disenfranchisement for statutory felonies not recognized at common law has no affirmative sanction in Section 2 and violates the Equal Protection Clause.

Three of the plaintiffs also argued that conditioning the restoration of the right to vote upon the payment of their criminal fines and restitution violates various provisions of the United States and Arizona Constitutions. Particularly, they alleged that this repayment condition violates the Equal Protection Clause of the Fourteenth Amendment, the Twenty-Fourth Amendment’s bar against poll taxes, the Privileges or Immunities Clauses in both the federal and Arizona Constitutions, and the Arizona Constitution’s provision mandating free and equal elections. Defendants’ motions to dismiss were granted, and plaintiffs now raise these same arguments on appeal.

We consider each of these arguments and **AFFIRM**.

NINTH CIRCUIT CASES

Doyle v. City of Medford, No. 07-35753 (May 26, 2010) Plaintiffs, who are former employees of Defendant City of Medford, allege that the City’s policy of denying health insurance coverage to retirees violates their due process rights. Specifically, Plaintiffs contend that Oregon Revised Statutes section 243.303 and City Resolution No. 5715 confer on them a property interest in post-retirement health insurance coverage that is protected by the Due Process Clause of the Fourteenth Amendment. Section 243.303 provides that a local government that offers health insurance coverage to its officers and employees “shall, insofar as and to the extent possible, make that coverage available for any retired employee” who elects it. We certified a question as to the interpretation of this provision to the Oregon Supreme Court and received that court’s answer. We now conclude that, under the Oregon Supreme Court’s interpretation of section 243.303, neither that statute nor Resolution No. 5715 creates a protected property interest. Accordingly, we affirm the district court’s entry of summary judgment to Defendants on Plaintiffs’ due process claim.

James v. Rowlands, No. 08-16642 (May 26, 2010) The Fourteenth Amendment protects parents’ fundamental right to participate in the care, custody, and management of their children. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981). This right extends to parents who, like the plaintiff here, have shared legal custody but lack physical custody of their children. *See Brittain v. Hansen*, 451

F.3d 982, 992 (9th Cir. 2006). In this case, we are asked to determine the circumstances under which the Fourteenth Amendment requires public officials to inform a parent with only joint legal custody about actions they take involving the parent’s child.

Plaintiff Daniel James brought this action under 42 U.S.C. § 1983 alleging that the defendants—two social workers from the Nevada County Child Protective Services Agency and a deputy sheriff—violated his substantive and procedural due process rights under the Fourteenth Amendment by failing to notify him of their investigation into allegations that his daughter, C.J., had



been molested and that someone had coerced her to change her testimony in the trial that followed. In addition, James contends that the two social worker defendants violated his rights by failing to inform him of events stemming from the molestation investigation: (1) a decision to detain C.J. temporarily and to take her into protective custody, and (2) a voluntary agreement with C.J.’s mother, who had physical custody, to place

C.J. with her maternal grandmother for the duration of the molestation trial. We conclude that the defendants are entitled to qualified immunity on these claims and accordingly affirm the grant of summary judgment.

First, we decline to decide whether James had a constitutional right to be informed of the molestation investigation or of the attempts to coerce C.J. to change her testimony. We conclude that,

NINTH CIRCUIT CASES

even if such rights existed, they were not clearly established. We therefore affirm the grant of qualified immunity on these two claims. Second, we hold that the CPS officials violated James's substantive due process right to participate in the care, custody, and management of his daughter by failing to notify him of her detention and placement in temporary protective custody and of the subsequent agreement transferring her physical custody for the duration of the molestation trial. We conclude, however, that James's right to this information was not clearly established and that the officials are therefore entitled to qualified immunity on these claims. Finally, we hold that the CPS officials did not violate James's procedural due process rights and accordingly affirm the grant of qualified immunity on that claim.

World Wide Rush LLC v. City of Los Angeles, Nos. 08-56454 (May 26, 2010) The City of Los Angeles appeals the grant of summary judgment in favor of World Wide Rush and Insite Outdoor Works LA and the entry of injunctions in favor of WWR and Wilshire Center, Jamison, and Sky Tag enjoining enforcement of certain billboard regulations. We must decide whether the district court erred in concluding that (1) the City's Freeway Facing Sign Ban is an unconstitutionally underinclusive restriction on commercial speech and (2) the City's Supergraphic and Off-Site Sign Bans are unconstitutional prior restraints on speech. Because the City's exceptions to the Freeway Facing Sign Ban do not undermine the City's asserted interests in enacting the Ban, and because the City Council's authority to create exceptions to the Supergraphic and Off-Site Sign Bans is a permissible aspect of its inherent legislative discretion, we reverse.

The City also appeals the district court's order finding it in civil contempt of the injunction

against enforcement of the Freeway Facing Sign Ban and the Supergraphic and Off-Site Sign Bans as to WWR's billboards. Because we vacate the injunction, we also reverse the contempt order. Finally, we affirm the district court's decision to allow just one round of amendments to the pleadings as a proper exercise of its discretion.

Sneller v. City of Bainbridge Island, No. 09-35056 (May 25, 2010) Plaintiffs-Appellants Jeffrey and Sherry Sneller appeal from a \$24,000 sanction award to Defendants-Appellees the City of Bainbridge Island, Meghan McKnight, Bob Earl, and Darlene Kordonowy under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. The Snellers argue that imposition of the sanction was error because they effectively withdrew any claims that violated Rule 11(b) during the safe harbor period, before Defendants filed their motion for sanctions. We agree and therefore reverse.

Anthoine v. North Central Counties Consortium, No. 08-16803 (May 24, 2010) In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that public employees do not have First Amendment protection for statements made pursuant to their official duties. In this case we consider the application of *Garcetti* to plaintiff-appellant Nelson Anthoine, a low-level employee who jumped the chain of command to report directly to the chairman of his employer's governing board that his immediate supervisor had misrepresented the status of the employer's compliance with its legal obligations. Anthoine was disciplined and terminated soon thereafter. Anthoine brought various claims in federal district court, and the court granted summary judgment against Anthoine. We hold that Anthoine

Law.com

has presented triable issues of fact on his First Amendment retaliation claim, and we reverse the summary judgment on that claim. We affirm the summary judgment against Anthoine on his gender discrimination and wrongful termination claims.

Law.com

Trend Watch: Employee-Customer Fights at the Wendy's Drive-Through Window

What is it about the drive-through line at Wendy's that is causing so much drama lately? What's up with all the fussin' and fightin,' people? Should drive-through employees receive combat pay? Let me recap what I've seen in just the last month or so.

May 4, 2010: At a Wendy's drive-through in Cumberland County, N.J., a customer rolled up on a Wendy's employee working the drive-through at 1 a.m. and started "talking sh*t" related to an argument over who was the father of the employee's child.

The employee threw a fruit punch on the customer, who then tried to get at the employee by [climbing in the drive-through window](#). Police did not charge either woman for their role in the scuffle, but they did charge the customer and her two passengers after finding a plastic bag with suspected marijuana in the car.

May 19, 2010: At a Wendy's drive-through window in Daytona Beach, Fla., two women who were upset with their order allegedly cursed out the employee at the window, and one took at swing at him. One of the women then got out of the car and went inside the Wendy's [brandishing a pink Taser stun gun](#). Police say she then chased the employee around the kitchen with the pink Taser while her cohort cheered her on.

The Taser-brandishing customer has been charged with aggravated assault with a deadly weapon, and her alleged "running mate" is charged with being a principal to aggravated assault with a deadly weapon.

June 12, 2010: At a Wendy's drive-through in Kalamazoo, Mich., a fist fight and a massive food fight broke out after four customers at the window claimed their order was incorrect. After what the employee termed a "communication breakdown," the disgruntled customers hurled food and drinks at an employee inside, who [retaliated by throwing a drink, ketchup and fries on their car](#). This escalated to hamburgers and french fries, and ultimately to punches and chairs being thrown after the two

people from the vehicle went inside the restaurant to continue the brawl. Two of the customers were arrested and charged with assault.

People, please! Think of the children in the minivan behind you before you try to crawl through the drive-through window to exact vengeance because your chicken sandwich has mayonnaise on it that you didn't ask for!

iPad, SchmiPad -- Get Your Favorite Lawyer a Pillow Tie

[Lowering the Bar](#) this morning features a new "it" item for lawyers forced to endure interminable conference calls: the [Pillow Tie](#). It is pretty much exactly what it sounds like:

And it comes in a surprising array of [colors and styles](#). The makers of the Pillow Tie promise that "when you rest your forehead on the soft, woven fabric, you will not be left with any incriminating lines from the pew in front of you, nor will you have to lay your face in someone else's drool an [sic] a communal air-



plane pillow." Also worth noting, the Pillow Tie is available in a clip-on.

Wile E. Coyote v. Acme Company: From the Docket

Did you know that there is an extensive docket of materials available online in the long-running Wile E. Coyote v. Acme Company case? As anyone over the age of 30 probably knows, Mr. Coyote for many years attempted to use Acme products in his pursuit of an elusive Road Runner. Without exception, to my knowledge, his efforts failed, often resulting in severe and unusual bodily injury. Not surprisingly, it appears that Mr. Coyote has elected to pursue a case against Acme for product liability and gross negligence.

Law.com

In his [opening statement](#), Mr. Coyote's attorney, Harold Schoff, pulled no punches.

Schoff said that on 85 separate occasions, Coyote had purchased Acme products



that caused him bodily injury, some of which "have temporarily restricted his ability to make a living in the profession of predator."

Consider some of Mr. Coyote allegations:

The Rocket Sled: Coyote alleges that the Rocket Sled accelerated with "such sudden and precipitate force as to stretch Mr. Coyote's forelimbs to a length of fifteen feet." Later, due to "poor design and engineering on the Rocket Sled and a faulty or non-existent steering system ... the unchecked progress of the Rocket Sled led it and Mr. Coyote into collision with the side of a mesa."

The Rocket Skates: Similar inadequacies in the Acme Rocket Skates caused him to lose control and collide "with a roadside billboard so violently as to leave a hole in the shape of his full silhouette."

Explosives: Coyote alleges that on "occasions too numerous to list," he has suffered mishaps with Acme explosives. Coyote claims that "indeed, it is safe to say that not once has an explosive purchased of Defendant by Mr. Coyote performed in an expected manner."

Spring-Powered Shoes. The complaint alleges in detail Coyote's harrowing experience with these shoes, which ultimately resulted in Coyote suffering an extraordinary injury that "caused Mr. Coyote to expand upward and contract downward alternately as he walked, and to emit an off-key, accordion-like wheezing with every step. The distracting and embarrassing nature of this symptom has been a major impediment to Mr. Coyote's pursuit of a normal social life."

As always, however, there are two sides to the story. Counsel for Acme, Nicholas J. McSlick, paints a very different picture, [arguing](#) that Coyote cannot prove his case and that moreover, he assumed known risks, failed to heed printed warnings, intentionally misused Acme products, and made substantial charges to the design and character of the products thereby voiding all warranties and absolving Acme of all

civil liability.

Among Acme's key arguments:

Coyote is a malingerer. Warner Bros. footage shows that despite claims of allegedly "horrendous, grotesque, debilitating and life threatening injuries, [Coyote] is seen no more than 30 seconds later totally uninjured and unscathed."

Rocket Sled: Coyote failed to assemble the sled properly and, in any event, "was seen 30 seconds later on the rocket skates which were purchased on the very same date as the rocket sled."

Rocket Skates: Coyote assumed a known risk attempting to pilot the skates while wearing plaster casts.

Spring-Powered Shoes: Coyote made alterations to the product, affixing them to a boulder, in contravention of the clear warning on the brochure included with his purchase, to wit: **WARNING! SEVERE RECOIL. THIS PRODUCT IS INTENDED FOR PERSONAL PROPULSION ONLY. ATTACH ACME SPRING-POWERED SHOES ONLY TO FEET, AS DESCRIBED IN THE OWNER'S MANUAL, PAGE 3, PARAGRAPH (a)(2). FAILURE TO FOLLOW OPERATING INSTRUCTIONS MAY RESULT IN SEVERE PERSONAL INJURY.**

In conclusion, McSlick argues, "the occupation of predator is high risk profession, and a large percentage of such businesses fail each year. Mr. Coyote does not wish to be compensated for any alleged negligence of Acme Company.

Instead, he seeks to be rewarded for his own negligence and ineptitude."

Ouch.

There is also an expert witness report (on behalf of the plaintiff) focused on the Rocket Skates available [here](#).

