

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Cramer v. State, Dep't of Motor Vehicles, 126 Nev. Adv. Op. No. 38 (October 7, 2010) In 1995, the Legislature enacted NRS 50.320, which permits the use of an affidavit to prove a person's blood-alcohol content in certain proceedings, including driver's license revocation hearings, by a person who has been previously qualified to testify as an expert witness by a district court.

In *Cramer v. State, Department of Motor Vehicles*, Docket No. 53248, we conclude that NRS 50.320 limits the use of an expert witness affidavit to persons previously qualified by a district court to testify as an expert witness. Therefore, an administrative hearing officer lacks discretion to admit expert witness testimony by affidavit when the affiant has not been qualified by a district court or the affidavit fails to state the district court in which the affiant was permitted to testify.

In *State, Department of Motor Vehicles v. Joseph*, Docket No. 53380, we reject the suggestion

that the district court qualification requirement in NRS 50.320 can be satisfied by way of a stipulation entered into by parties in a separate, unrelated district court case.

Hoagland v. State, 126 Nev. Adv. Op. No. 37 (October 7, 2010) In this appeal, we consider whether necessity may be asserted as a defense to a charge of driving a vehicle while under the influence of intoxicating liquor (DUI). Because necessity is a common law defense and the Legislature has not limited its use, we conclude that necessity is available as a defense to a charge of DUI. However, we conclude that the district court did not commit error in this case by refusing to instruct the jury on necessity because appellant Richard Hoagland's offer of proof was insufficient as a matter of law to satisfy an element of the defense.

J.D. Construction, Inc. v. IBEX Int'l Group, LLC, 126 Nev. Adv. Op. No. 36 (October 7, 2010) Appellants J.D. Con-

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October 2010



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struction, Inc., Jerry Daugherty, and Carrie Daugherty (collectively, J.D. Construction) placed a mechanic's lien on property owned by respondent IBEX International Group, LLC. IBEX sought to expunge the lien, pursuant to NRS 108.2275, arguing that it was frivolous and/or excessive. The district court concluded that the lien was excessive and expunged the lien.

In this opinion, we address the proper scope and nature of NRS 108.2275 proceedings where a property owner seeks to expunge a frivolous or excessive lien. We conclude that when a property owner seeks to remove a lien by arguing it is frivolous or excessive, the district court must determine the material facts in order to reach a conclusion regarding whether a lien is frivolous or excessive.

We conclude that in making these factual determinations, the district court is not required to hold a full evidentiary hearing, but instead may base its decision on affidavits and documentary evidence submitted by the parties.

We also conclude that this procedure meets due process requirements. However, pursuant to the time frame mandated by NRS 108.2275(3), if the district court determines that a hearing is necessary, the hearing must be held within 15 to 30 days of the court's order for a hearing. And while any hearing must be initiated within that time frame, the statute does not require the district court to resolve the matter within that time frame.

Finally, we conclude that, in evaluating whether a lien is excessive, the district court must use a preponderance-of-the-evidence standard, rather than the reasonable-cause standard used for frivolous liens, and the burden is on the lien claimant to prove the lien and the amount claimed. In this case, J.D. Construction had the burden to show the adequacy of its lien, and it failed to do

so. Accordingly, we affirm the order of the district court because it reached the right result even though for the wrong reason.[]

San Juan v. PSC Industrial Outsourcing, Inc., 126 Nev. Adv. Op. No. 35 (October 7, 2010) Our case law holds that a person who hires an independent contractor is not, without more, vicariously liable to the independent contractor's employees for their employer's torts, even though the job involves inherent danger or "peculiar risk." The issue presented by this appeal is whether this rule depends on the employer being solvent and competent. We hold that it does not. The Nevada workers' compensation system covers injured workers without regard to their employer's solvency. And competence, judged after the fact and without regard to the hirer's knowledge or fault, does not differ meaningfully from negligence. Holding a person who hires an independent contractor vicariously liable when the contractor turns out to be incompetent but not if he proves negligent draws a distinction the law does not support. For these and the other reasons below, we affirm the district court's summary judgment.



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'Red Light' Cameras Soon to Be 'Anything We Can Ticket You for' Cameras?

Back in July, we brought you the news that a court in California had ruled that photographs taken by "red light cameras" were inadmissible as hearsay in a case where a motorist ticketed for running a red light challenged his citation.

Not only has this ruling not deterred California municipalities from operating the "photographic enforcement" systems, but, as reported by the *Los Angeles Times'* LA Now blog (and FindLaw's Law & Daily Life), the city is keenly aware that more revenue can be generated from use of the cameras if they can just tweak the law to allow tickets to be issued for all of the other driver naughtiness captured on film.

What other infractions are often captured by these unblinking mechanical eyes of the road?

Use of a cellphone while driving
Seatbelt violations

Turning from an improper lane
Failure to yield to pedestrians

Improper use of earphones (California law makes it illegal to have them in both ears simultaneously)

Reckless driving

"Speed contests" (presumably a politically correct term for the prohibition on drag racing)

Expired registration

There's enough controversy about these cameras being used to detect and punish red light violations. (See, for example, the fight about Houston's ballot initiative to eliminate the cameras in the city.) I'd have to imagine groups like Ban the Cams would go absolutely nuts if

governments move further in the direction of having the cameras do the jobs of traffic cops wholesale.

Pay Your \$75 Fee or South Fulton Fire Dept. Will Watch Your Home Burn to the Ground

I thought a statement made by the Oakland Police back in August was pretty bold ("If you come home to find your house burglarized and you call, we're not coming"), but that was before I learned about how they roll at the South Fulton Fire Department in Tennessee. To put it simply, the SFFD would like you to know that if you don't pay your annual \$75 county fire service fee, they will stand by and *watch your house burn to the ground*.

If you think the SFFD is bluffing, just ask Gene Cranick. He failed to pay his \$75 and then had the misfortune of seeing his home catch fire. The Cranicks called 911 several times, and were told that the SFFD would not come on account of, you know, the \$75. The Cranicks then reportedly offered to pay the \$75 if firefighters would extinguish the fire, but that offer was rejected. "I thought they'd come out and put it out, even if you hadn't paid your \$75, but I was wrong," Gene Cranick told local TV station WPSD. The SFFD later did come to the scene when the fire spread to a fee-paying neighbor's field, but still refused to put the fire out at the Cranick's home. South Fulton Mayor David Crocker stated "anybody that's not in the city of South Fulton, it's a service we offer, either they accept it or they don't."

Elmo Attacker Detained for Mental Health Evaluation

Don't mess with Elmo. He's all furry and red and cute, but if provoked he will throw down and beat your a\$\$\$. That's exactly what happened over the weekend in Winter Park, Fla., according to a re-

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port by CNN.

Elmo or, more precisely, Jeremy Trespacios, the guy dressed up like him, was working an event at a toy store, and decided to take a walk to a nearby guitar store. Another guitar store customer -- perhaps because he prefers Grover -- started throwing punches.

Elmo emerged victorious when, now sans head and gloves, he shoved the attacker head first into a glass display case. No worries though, all agree Elmo was simply defending himself, and no charges will be brought against him.

Big week for Elmo after his involvement in [boobgate](#).



Tips for Motorists on How to Get a Warning, Not a Ticket

Via [Consumerist](#) I found this [article](#) from MarketWatch on what motorists should say (and not say) to police officers when they are pulled over. The article offers a reminder that with very few exceptions, police are not mandated to write you a ticket after pulling you over. In fact, the article states, most officers would actually prefer to "send you on your way with a friendly warning."

Thus, what you say and do in your brief interaction with the officer during the stop can be critical to the ultimate outcome, *i.e.*, a ticket or no ticket.

Some tips from the article:

1. "Play nice"

In other words, accept that the police have caught you doing something that's against the law. Do not argue and demand information, or imply the officer pulled you over for no reason. As one Chicago officer put it, "if they try to take charge of the traffic stop, they're not going to get out of it without a ticket. We ask the questions, not them."

2. "Keep it honest"

Don't lie. An officer from the LAPD estimates that nine out of 10 people lie to him, which he views as "an attack on our intelligence." On the flip side, sometimes the truth is all the officer needs to hear to send you on your way with just a warning, such as the young man pulled over for speeding who confessed he wasn't paying attention because he was on Cloud 9 after "the best date of my life. I just met my future bride." "How are you going to write that guy up after that?" a New Jersey officer wondered. (As I noted [here](#), other truthful statements such as "I was speeding because my colonoscopy bag is leaking" can also be effective).

Some other tips from police:

- don't use pejoratives;**
- don't call female officers "baby" or "sweetheart;"**
- don't interrupt the officer;**
- stay calm; and**
- avoid quick movements, as police must assume, for their own safety, that everyone is carrying a gun.**

Read all of the tips in the full article [here](#).

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Johnson v. Santiago Cmty. Coll. Dist., No. 08-56963 (October 8, 2010) In 2003, Rancho Santiago Community College District entered into a project labor agreement with the Los Angeles and Orange Counties Building and Construction Trades Council and its affiliated construction unions that governed labor relations for many District construction projects over a three-to-five-year period. The agreement required, among other things, that contractors use union “hiring halls” to obtain workers, that all workers on covered projects become union members within seven days of their employment, and that all contractors and subcontractors working on covered projects agree to the project labor agreement and to the master labor agreement negotiated by the union for each craft. Seven individual non-union apprentices and two non-union apprenticeship committees filed suit challenging the agreement as preempted by the National Labor Relations Act and the Employee Retirement Income Security Act and as violative of their rights to substantive and procedural due process and to equal protection. The district court granted the defendants summary judgment on all claims.

Reviewing de novo, we hold that entering into the agreement constitutes market participation not subject to preemption by the NLRA or ERISA, and that the agreement did not violate the plaintiffs’ rights to substantive or procedural due process or to equal protection. As a preliminary matter, we also reject the District’s mootness and Eleventh Amendment sovereign immunity defenses. Specifically, we conclude that this appeal falls within the “capable of repetition, yet evading review” exception to mootness, and that the District waived any sovereign immunity defense by failing to pursue it while extensively litigating this suit on the merits. Ac-

cordingly, we affirm.

Luchtel v. Hagemann, No. 09-35446 (October 7, 2010) Karey Luchtel, after using crack cocaine and fearing that her husband was trying to kill her, ran into the street with her young son. Witnesses who called 911 reported that she was screaming for help and threatening to harm herself. She hid under a car until her neighbors provided refuge in their house. The police were summoned by Luchtel’s husband and other neighbors who heard her screams. Inside the neighbors’ house, the officers confronted Luchtel, and she stated that they were not actual police officers but assassins hired to kill her. Luchtel grabbed her elderly neighbor to use for protection. After using their bodies and handcuffs to detain and arrest Luchtel, the officers took her to a hospital for mental evaluation and treatment of injuries.

Luchtel sued under 42 U.S.C. § 1983, contending that there was a lack of probable cause to arrest her, and that excessive force was used by the officers. She also sued under Washington state law for, among other things, false arrest, negligence, and assault and battery. The district court granted summary judgment for the defendants on all claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Community House, Inc. v. Bieter, No. 09-35780 (October 6, 2010) The lawsuit underlying this appeal arises from the City of Boise, Idaho’s communal assumption almost twenty years ago of shared responsibility for the care and housing of a vulnerable sector of its population — the homeless. In connection with the City’s legislative objectives, Community House, Inc. leased from the City in 1994 as part of a public/private partnership a building that CHI operated as a homeless shelter and as low-income transi-

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tional housing. In 2004, CHI and the City agreed to terminate the lease agreement and CHI's right to manage the building. In 2005, the City leased the building to the Boise Rescue Mission, an organization that operates the facility as a homeless shelter for single men and that includes in its activities Christian religious services and pre-meal prayers. In 2007, the BRM purchased the facility pursuant to an option contained in the lease agreement. After CHI agreed to terminate its lease but before the

We hold that Mayor Bieter and the members of the City Council are entitled to absolute legislative immunity for their actions in promoting and approving the lease and sale of Community House to the BRM. Additionally, municipal employees Chatterton and Birdsall as individuals are entitled to qualified immunity because at the time the City approved the lease and sale, a reasonable official would not have known that such actions would violate the Es-



City's new lease with the BRM, CHI, along with several individual plaintiffs, filed a civil rights complaint under 42 U.S.C. § 1983 against the City and the Boise City Council, alleging, among other things, that the anticipated lease of the building to the BRM violated the First Amendment's anti-Establishment Clause and the federal Fair Housing Act.

tablishment Clause or the FHA. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.

Kirk v. Chief Justice Walther Carpeneti, No. 09-35860 (September 30, 2010) Since statehood in 1959, Alaska has selected its state judges through a system generically and popularly known as "merit selection." The Gover-

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nor appoints judges from a list of nominees selected from all applicants by a merit selection commission. In Alaska, all judges must be lawyers. Lawyers therefore play a significant role on the merit selection commission.

The commission, known as the Judicial Council, is chaired by the Chief Justice of the Alaska Supreme Court and composed of six additional members — three lay members appointed by the Governor and confirmed by the Legislature, and three attorney members appointed by the Board of Governors of the Alaska Bar Association. The Board is the Association's governing body and membership in the Association is mandatory for all lawyers practicing in the state. This suit is an attack on Alaska's merit selection system, brought by a group of individuals seeking to establish the principle that all participants in the judicial selection process must either be popularly elected, or be appointed by a popularly elected official. Thus, Plaintiffs seek to enjoin operation of the Alaska system because three members of the Judicial Council are appointed by the governing body of the Alaska Bar Association, which is in turn elected by the Bar membership and not by the public at large.

Plaintiffs are hard-pressed to find legal support for the principle they seek to establish.

Because the federal litigation has not resulted in any precedential opinion in any circuit, this case has gained the attention of individuals and groups with an interest in either protecting or replacing merit selection. This litigation, therefore, must be seen as part of a larger controversy generated by attacks on merit selection by proponents of popularly elected judges.

We therefore take this opportunity to publish an

opinion dealing with the issues Plaintiffs raise as best we are able to perceive them. We turn first, however, to the background of merit selection in Alaska and of this litigation.

Bailey v. United States, No. 09-16247 (September 29, 2010) On Memorial Day weekend 2005, John Bailey rowed his boat over a submerged dam on the Yuba River in Northern California. The boat foundered, and Bailey drowned. The Army Corps of Engineers had placed signs warning of the dam, mid-river upstream of, and on the banks near the dam. However, recent heavy river flows had washed the signs away. Four days before Bailey met his sad fate, the Corps had attempted to replace the warning signs, but had judged that the Yuba was so turbulent as to threaten the safety of its workers who had to ford the river to attach new signs and buoys. Bailey's widow and children brought suit claiming the government was negligent in the Corps' failure to place the warning signs.

The district court granted a motion to dismiss the Baileys' complaint on grounds the Federal Torts Claims Act provided the government immunity from suit under the facts alleged and shown, because the decision not to place the warning signs on account of worker peril was a discretionary decision commended by Congress for decision by the Corps, not to be second-guessed by a court or jury. Mrs. Bailey and her children appeal. We conclude the discretionary function exception to liability applies. The district court acted correctly, and we affirm.

Powell's Books v. Kroger, No. 09-35153 (September 20, 2010) We consider here the constitutionality of a pair of Oregon statutes

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intended to stop child sexual abuse in its early stages. The statutes broadly take aim at practices of “luring” and “grooming” that expose minors to sexually explicit materials in the hopes of lowering their inhibitions against engaging in sexual conduct. The “furnishing” statute, Oregon Revised Statutes § 167.054, criminalizes providing children under the age of thirteen with sexually explicit material. The “luring” statute, § 167.057, criminalizes providing minors under the age of eighteen with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct.

Appellants, a broad cross-section of booksellers; non-profit literary, legal, and health organizations; and a concerned grandmother, argue that these statutes violate the First Amendment. In particular, Powell’s Books claims, among other things, that the statutes are facially overbroad and criminalize a substantial amount of constitutionally protected speech. We agree.

Lopez v. Candaele, No. 09-56238 (September 17, 2010) Today we consider a student’s First Amendment challenge to a community college sexual harassment policy. First Amendment cases raise “unique standing considerations,” *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), that “tilt[] dramatically toward a finding of standing,” *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Despite this lowered threshold for establishing standing and the disturbing facts of this case, we conclude that the student failed to make a clear showing that his intended speech on religious topics gave rise to a specific and credible threat of adverse action from college officials under the college’s sexual harassment policy. Because the student failed to carry the burden of proving he suf-

fered an injury in fact, he does not satisfy the “irreducible constitutional minimum of standing” necessary to challenge the policy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Braswell v. Shoreline Fire Dep’t, No. 09-35974 (September 16, 2010) Plaintiff Bryan Braswell, a firefighter employed by Defendant Shoreline Fire Department who formerly practiced as a paramedic with Shoreline under Defendant Gary Somers’ medical license, filed this action under 42 U.S.C. § 1983. Plaintiff alleges that he had a property interest in his employment with Shoreline and a liberty interest in pursuing his profession as a paramedic and that Defendants deprived him of those interests without due process when they removed him from his paramedic position without providing adequate notice and a hearing. Plaintiff also alleges that Dr. Somers tortiously interfered with his employment. The district court granted summary judgment to Defendants. Re-viewing de novo, *Dietrich v. John Ascuaga’s Nugget*, 548 F.3d 892, 896 (9th Cir. 2008), we affirm except with respect to the alleged liberty interest. As to that claim, we reverse and remand.

