

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. No. 57 (December 30, 2010) On July 1, 2010, this court issued an opinion in these appeals. *Bahena v. Goodyear Tire & Rubber Co.* (*Bahena I*), 126 Nev. ___, 235 P.3d 592 (2010). In *Bahena I*, we addressed whether the district courts sanction of striking Goodyear's answer as to liability and only allowing it to contest damages was proper and whether an evidentiary hearing was required when the sanction was a non-case concluding sanction. We ultimately upheld the sanction and ruled that when a sanction is non-case concluding, an evidentiary hearing is not mandatory. Respondent Goodyear and amici curiae seek rehearing of that opinion. Although rehearing is not warranted, we address a number of the issues raised by Goodyear and the amici in order to clarify *Bahena I*. Because the facts and procedural history in this case were set forth in our prior opinion, we do not recount them here except as necessary for our disposition of the instant petition for rehearing.

Personhood Nevada v. Bristol, 126 Nev. Adv. Op. No. 56 (December 30, 2010) This is an appeal from a district court order determining that a proposed initiative violated NRS 295.009's single-subject rule and enjoining its placement on the 2010 general election ballot. Before this appeal could be decided, the deadline for submitting initiative signatures to the Secretary of State passed without the initiative's proponents having submitted any signatures, and the 2010 general election concluded without the initiative being included on the ballot. As a result, even if this court were to reverse the district court's order, we could grant no effective relief from that order, rendering this appeal moot. Because the appeal is moot, we dismiss it. In so doing, we address whether issue preclusion principles apply to the district court's order, even though the appeal from that order is dismissed as moot, and we conclude that they do not.

Public Lawyers
Section

January 2011



Inside this issue:

<i>Law.com</i>	6
<i>Ninth Circuit Cases</i>	9
<i>krollontrack</i>	16



Nevada Supreme Court Cases

Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. Adv. Op. No. 55 (December 30, 2010) In this appeal, we examine the effect of this amendment on the “good cause” analysis we articulated in *Scrimmer v. District Court*, 116 Nev. 507, 998 P.2d 1190 (2000), to obtain an enlargement of time to effectuate service of process. We conclude that the 2004 amendment to NRCPC 4(i) requires district courts to first consider if good cause exists for filing an untimely motion for enlargement of time. Only upon a showing of good cause for the delay in filing the motion to enlarge time should the court then employ a complete *Scrimmer* analysis to determine whether good cause exists to enlarge the time for service under NRCPC 4(i). Here, because appellant Gabriela Saavedra-Sandoval failed to demonstrate good cause for filing her untimely motion to enlarge time, we conclude that the district court did not abuse its discretion in granting respondent Wal-Mart Stores, Inc.’s motion to dismiss for failure to effect timely service of process. We therefore affirm.

Yonker Construction v. Hulme, 126 Nev. Adv. Op. No. 54 (December 30, 2010) NRS 108.2275(6)(a) provides that, if the district court determines that a mechanic’s lien is frivolous and made without reasonable cause, the court must enter an order releasing the lien and awarding attorney fees and costs to the applicant. Here, however, while the district court made the requisite determinations and ordered the lien released, it failed to award attorney fees and costs at that time, instead directing the applicant to file an affidavit of attorney fees and a verified memorandum of costs. Because the challenged order reserved the award of attorney fees and costs for a later date, it does not constitute an appealable order within the terms of NRS 108.2275, rendering this appeal premature. *AA Primo Builders v. Washington*, 126 Nev. Adv. Op. No. 53 (December 30, 2010) Appellant AA Primo Builders, LLC appeals the dismissal of its

suit to recover money allegedly due from respondents Bertral and Cheri Washington on a 2005 patio remodel job. The dismissal came in 2009, more than three years into the litigation. It was based on the Secretary of State having revoked AA Primo’s charter to do business as a Nevada limited liability company, effective December 1, 2008. AA Primo asked the district court for a stay to give it time to make the annual filings needed to reinstate its charter, but the district court refused, instead granting the Washingtons’ summary judgment motion. AA Primo next filed a timely motion under NRCPC 59 asking the district court to vacate the judgment of dismissal, because by then it had succeeded in reinstating its charter. Again, the district court refused relief, and it also awarded the Washingtons their fees and costs. This appeal followed.

We reverse. Dismissal was too harsh a penalty for AA Primo’s default in annual fees and filings due the Secretary of State. Administrative revocation of a domestic limited liability company’s charter suspends the entity’s right to transact business, not its ability to prosecute an ongoing suit. See NRS 86.274(5); NRS 86.505. Under NRS 86.276(5), moreover, reinstatement retroactively restores the entity’s right to transact business; it is “as if such right had at all times remained in full force and effect.” Thus, AA Primo’s suit should not have been dismissed and, having been dismissed, should have been reinstated once AA Primo’s charter was. Finally, before dismissal, the district court should have given AA Primo the brief stay it requested to seek charter reinstatement.

City of Las Vegas v. Lawson, 126 Nev. Adv. Op. No. 52 (December 30, 2010) While working as a firefighter with appellant City of Las Vegas, respondent Robin Lawson was diag-

Nevada Supreme Court Cases

nosed with breast cancer in 1997 and again in 2005. In this appeal, we first consider whether Lawson's 2005 notice of her claim for workers' compensation was timely. Because we conclude that Lawson did not learn from her physician until 2005 that her breast cancer was related to her work as a firefighter, we conclude that she gave the City timely notice of her occupational disease claim.

Next, we consider whether an appeals officer erroneously determined that Lawson was exposed to two known carcinogens during her employment as a firefighter, and that there was a "reasonable association" between the carcinogens and breast cancer. If so, under NRS 617.453, it is presumed that Lawson's breast cancer arose "out of and in the course of [her] employment." We conclude that substantial evidence supports the appeals officer's decision that one of the carcinogens falls within the statutory definition of "known carcinogen." Although we conclude that the appeals officer incorrectly determined that the other carcinogen met the statutory definition, substantial evidence still supports the finding that Lawson was exposed to the known carcinogen that does meet the definition and that the known carcinogen is reasonably associated with her breast cancer. Lawson was therefore entitled to the presumption that her breast cancer arose out of her employment, and we conclude that the City failed to rebut the presumption. Accordingly, we affirm the district court's denial of the City's petition for judicial review.

Gonski v. Second Judicial Dist. Court, 126 Nev. Adv. Op. No. 51 (December 30, 2010) This original writ proceeding involves real party in interest's attempt to enforce two arbitration provisions that it drafted with respect to

petitioners' purchase of a residential home in Reno, Nevada. Petitioners argue that the two arbitration clauses at issue, one of which was in the purchase agreement and the other of which was contained in a limited warranty, are unconscionable, and thus unenforceable, for a variety of reasons. Most significantly, petitioners assert that the arbitration provisions waived statutory remedies and failed to fully and clearly inform petitioners of the significant rights being forfeited. The district court disagreed, however, and compelled arbitration, causing petitioners to seek this court's review.

We conclude that the arbitration provisions at issue are unconscionable as to several aspects that, taken together, demonstrate that petitioners were not made fully aware, or given the opportunity to become aware, of the provisions' terms. In particular, the circumstances under which the provisions were signed, combined with their nonhighlighted nature, failed to provide petitioners with a meaningful opportunity to agree to the arbitration terms. Also, the first provision misleadingly suggested that real party in interest would pay the arbitration costs, while the second document, purportedly incorporated into the first, required petitioners to pay the initial arbitration costs. And finally and most significantly, the provisions' confusing language suggested that NRS Chapter 40 remedies would be fully available, even though the terms of the contract impermissibly waived most Chapter 40 homeowner protections. The provisions' confusing and misleading language created a situation in which petitioners could not reasonably be expected to understand the terms' meanings, even if they were given adequate opportunity for review. Further, they impermissibly waived statutory rights designed to effect a public purpose, in favor of real party in interest. Accordingly, the arbitration provisions governing con-

Nevada Supreme Court Cases

struction defects are unconscionable, and the district court abused its discretion in compelling arbitration, such that mandamus relief is warranted.

Fanders v. Riverside Resort & Casino, 126 Nev. Adv. Op. No. 50 (December 30, 2010) This case arises from an intentional tort and negligence action filed by appellant Juana Fanders after she allegedly was injured by security guards on the premises of her former employer, respondent Riverside Resort and Casino, Inc. Respondents Angela M. Grissom, Louis G. Marino, David E. Barnes, Danny Lundsford, John C. England, and Ona Rogers were the security guards involved in the incident. The district court granted summary judgment to respondents on all counts based on its conclusion that all of Fanders' claims were precluded by the exclusivity provision of the workers' compensation statutes found in the Nevada Industrial Insurance Act (NIIA).

We conclude that the district court erred when it granted summary judgment because there are genuine issues of material fact as to whether Fanders' injuries arose out of and in the course of her employment, and thus, whether they were covered by workers' compensation. Accordingly, we reverse the summary judgment and remand this matter to the district court for further consideration of Fanders' claims

Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. Adv. Op. No. 49 (December 16, 2010) In this appeal, we address whether recent legislative amendments to the mechanic's lien law abrogated or overruled *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990), and Nevada's substantial compliance doctrine. We conclude that *Fondren* and the substantial compliance doctrine are still good law. An owner

must have either pre-lien notice or actual knowledge as described in *Fondren* in order to prevail in a lien action against that owner. Additionally, strict compliance with the mechanic's lien statutes is not required to perfect a lien. However, while substantial compliance is still the law in Nevada, substantial compliance requires actual notice to the owner and under the facts of this case, mere notice to the tenant is not sufficient.

Therefore, the district court erred in granting summary judgment against O'Neil and Hardy because pre-lien notice was unnecessary if SNMARK had actual knowledge of O'Neil's or Hardy's work. The question of whether SNMARK had actual knowledge is a question of material fact that must be determined by the district court upon remand.

Pyramid Lake Paiute Tribe v. State Eng'r, 126 Nev. Adv. Op. No. 48 (December 16, 2010) In this appeal, we review the State Engineer's decision to grant Nevada Land and Resource Company, LLC's (NLRC), change application for its water rights in Washoe County's Dodge Flat Hydrologic Basin. In 1980, NLRC obtained permits to appropriate Dodge Flat groundwater for temporary use in a mining and milling project. That project failed to materialize, but NLRC kept its water rights valid and in good standing. Twenty years later, NLRC applied to change its use from temporary to permanent and from mining and milling to industrial power generating purposes.[1] The Pyramid Lake Paiute Tribe (the Tribe) opposed the application. After the State Engineer granted the application, the Tribe filed a petition for review in district court. The district court denied the petition, and the Tribe now appeals to this court.

In 1944, the federal district court for the district

Nevada Supreme Court Cases

of Nevada entered the Orr Ditch decree, which adjudicated water rights on the Truckee River. “Under the Decree, the Tribe owns Claims No. 1 and 2, the two most senior water rights on the Truckee River.” *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1155 (9th Cir. 2010). In *Nevada v. United States*, 463 U.S. 110, 133 (1983), the United States Supreme Court ruled that the Orr Ditch decree represented “the full ‘implied-reservation-of-water’ rights that were due the Pyramid Lake Indian Reservation.” Thus, *res judicata* barred the Tribe from asserting additional federally implied water rights for the Pyramid Lake reservation. *Id.* at 145. Therefore, the Tribe cannot assert a federally implied water right to the Dodge Flat groundwater.

Moon v. McDonald Carano Wilson LLP, 126 Nev. Adv. Op. No. 47 (December 16, 2010) In this appeal, we address the interaction of NRCP 16.1 mandatory pretrial discovery requirements with the Nevada Arbitration Rules. Specifically, we determine whether cases not automatically exempted from the court-annexed arbitration program by designation on the initial pleading, which are ultimately exempted from the program by the arbitration commissioner under the procedures outlined in NAR 5(A), are actually in the program during the time prior to their exemption and are thus not subject to the requirements of NRCP 16.1 during this time period. We conclude that cases are not actually in the court-annexed arbitration program until they are assigned to an arbitrator, or ordered or remanded into the program by the district court. As a result, such cases that are awaiting exemption are not actually in the program during the period prior to exemption, and thus, we hold that the deadlines and requirements of NRCP 16.1 continue to apply during this time period.

Berkson v. LePome, 126 Nev. Adv. Op. No. 46 (December 16, 2010) For the first time, we consider NRS 11.340, a statute enacted by the Legislature in 1911[2] that provides a plaintiff whose judgment is subsequently reversed on appeal with the right to file a new action within one year after the reversal. We conclude that this statute violates the separation of powers doctrine because it unconstitutionally interferes with the judiciary’s authority to manage the judicial process and this court’s ability to finally resolve matters on appeal by precluding subsequent and repetitive efforts to relitigate the same claims. As we strike NRS 11.340, we necessarily examine the district court’s dismissal of the underlying action on preclusion grounds. We affirm the district court’s order because appellants relied solely on NRS 11.340 and failed to provide any arguments to explain why claim and issue preclusion should not apply. Finally, we conclude that the district court abused its discretion in awarding attorney fees and costs to respondents to sanction appellants for filing a frivolous complaint, and therefore, we reverse the post-judgment attorney fees and costs award to respondents.



Law.com

Florida's 'Taj Majal' Courthouse Leads to New Rules Against 'Grandiose, Monumental and Luxurious' Facilities



I have been following the ongoing reports from Tallahassee, Fla., about a newly-built courthouse that houses the 1st District Court of Appeal of Florida. To make a long story short, it appears that the judges of the 1st DCA somehow managed to accidentally build themselves a "Taj Mahal"-caliber facility that includes "27 flat screen TVs, bathrooms and kitchens for all 15 judges, granite counter- and desktops and miles of African mahogany" among other things, the *Miami Herald* reports.

I do not know how the planning, funding and construction of a \$49 million Taj Mahal could have escaped the notice of everyone involved until it was all-but-completed, but that appears to be the case. Now members of the Florida Senate are up-in-arms about how such a development could have occurred, and "angrily questioned" two 1st DCA judges on Wednesday about the matter, according to *Florida Today*.

During the hearing, two judges apologized "if the building exceeded legislative intent" and Florida Supreme Court Justice Charles Canady promised to issue an order that would require closer scrutiny of future capital projects for courts.

Sen. Mike Fasano, chair of the Florida Senate's Criminal and Civil Justice Appropriations Com-

mittee that called the hearing, noted that the new building -- initially estimated to cost \$22 million -- will ultimately cost taxpayers more than \$70 million after interest is paid on the bond that financed it.

"Somebody had to make this decision" to spend more, Fasano said. "Somebody has to explain that to us. (The Legislature) didn't put the African mahogany in there. We didn't put the granite countertops in there. We didn't ask for two robing rooms. Who signs off on it? Who made that decision? Was it a committee, was it an individual, who?"

"Who" remains a mystery, it seems, but Supreme Court Justice Canady did issue an order yesterday stating that going forward, "[e]very dollar should be spent wisely and with an unceasing awareness that it is hard earned taxpayer money.... Courthouses should be dignified, durable and functional. They should not be grandiose, monumental and luxurious." He also reportedly forced Judge Paul M. Hawkes to resign as chief judge of the 1st DCA.

Improved Google Scholar More Useful to Lawyers

When Google Scholar was introduced back in late 2009, we noted [here](#) that "there's no ignoring a 1,000-pound gorilla. Google's entry into the area of legal research is definitely a game changer for the entire legal industry." Google Scholar's impact on Westlaw and LexisNexis, however, was no doubt limited by the fact that its search functionality was nowhere near as sophisticated.

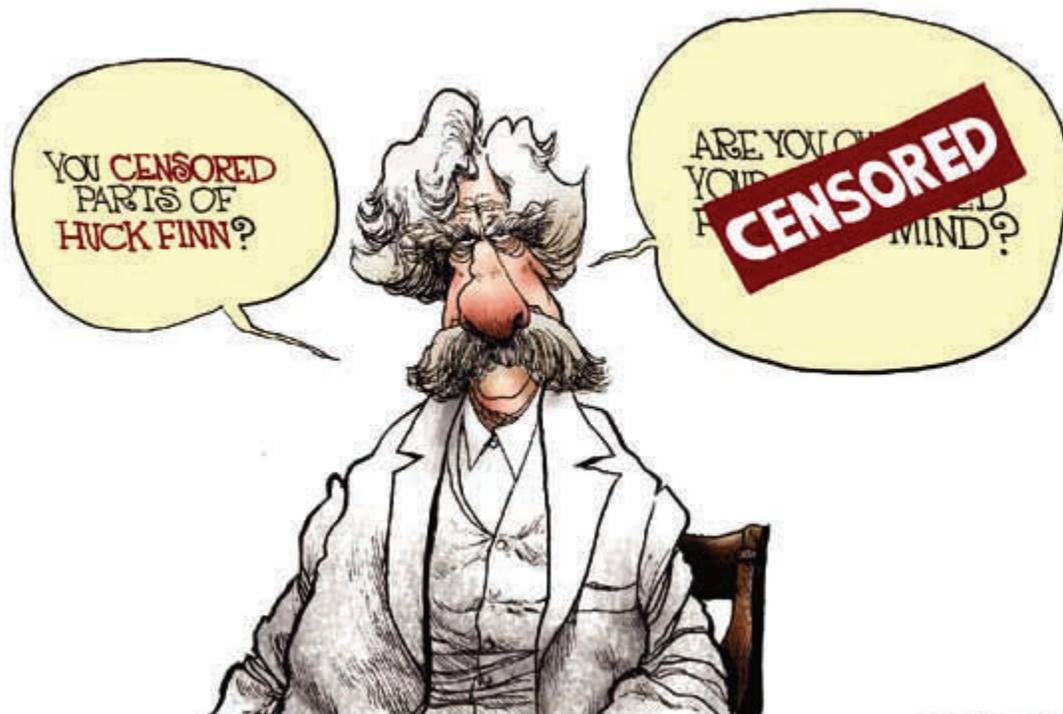
Law.com

Last week Google Scholar **announced** (via **Wis-Blawg**) that it has taken another step forward, enhancing its "**Advanced Search**" capability to allow users to select a specific federal jurisdiction or state for their search. Users simply select the specific federal court or other jurisdictions they wish to search by checking the appropriate box (see below). The more refined and timely Google

sentenced to 45 days for cyberbullying, following his involvement with a group of anonymous Web users who tried to induce a teen to commit suicide.

The victim in this case posted nude pictures of himself on the Internet when he was 12 or 13. This wasn't the smartest thing to do, but then again, 12- and 13 year-olds aren't always

RAMIREZ INVESTORS RIGHTS ONLY
2011 © CREATORS.COM



www.investors.com/cartoons

Scholar becomes, the more lawyers can actually consider using it in their practice over other fee-based options.

20-Year-Old Sentenced to 45 Days for Cyberbullying

This week, 20 year-old Matthew Riskin Bean was

known for being especially savvy.

A few years later, Bean discovered comments about the photo on an online imageboard, and he e-mailed the images to the teenager's school, claiming to be a "concerned mother" of another boy at the school, according to the *Philadelphia Daily News*.

Law.com

U.S. District Judge Anita Brody described Bean's crime as "extremely malicious" and said, "You have to be blind to what's going on in this world not to know the effect of cyberbullying on present-day society."

As the *ABA Journal* notes, Bean could have been sentenced to five years in prison if had been charged with distributing child pornography. Instead, he got off easy with only a 45-day sentence and five years of probation.

Even so, a few minutes of bad decisions could haunt Bean for the rest of his life. I wonder what potential employers will think of him when he has to disclose on job applications that he has been convicted of a crime.

Side note: A defense attorney apparently requested an alternative placement for Bean on the grounds that his client's young age and his small size -- he stands 5-feet-4-inches tall and weighs 110 pounds -- would make Bean a target for abuse. What goes around comes around

Warning: Not All E-Mails Are Created Equal

The attorney-client privilege extends to e-mails exchanged between a lawyer and his or her client ... unless you send it from work. A California court of appeal held an e-mail sent from a client to his or her attorney from a work e-mail account is not a privileged or confidential communication. The **unanimous decision** held that this type of communication was comparable to consulting your lawyer in your "employer's conference room, in a loud voice, with the door open" where any reasonable person would expect the employer to overhear it.

The court supported its decision with the fact that the employer had a policy that stated that company e-mail accounts should only be used for company business, that e-mails were not private, and that e-mails could be monitored to ensure that employees complied with the policy.

Wired's Threat Level said it best: "Case law on electronic privacy in the workplace is slowly evolving, and not always for the best." The courts have come to opposing decisions in regards to communications transmitted using employer-provided devices. In 2010, the U.S. Supreme Court held that **text messages on an employer-provided pager are not private**. However, the New Jersey Supreme Court held that e-mails sent from a **personal e-mail account using a work computer** are, in fact, private. The New Jersey decision was based in part on the fact that the company did not have a clear e-mail policy.

This is a difficult issue. Clients are often at work when attorneys are in their offices. If it is expected for employees to take care of personal affairs during work time that do not take up much time -- such as scheduling a doctor's appointment -- why shouldn't they be able to send their attorney an e-mail, particularly if they work for a company that blocks personal web-based e-mail?

For now, the take-home message is if you need to communicate via e-mail with your attorney during the work day, do it using your personal smartphone, preferably while hiding in a bathroom stall.

NINTH CIRCUIT CASES

Harris v. Maricopa County Superior Court, No. 09-15833 (January 20, 2010) After he was forced out of his position as an Initial Appearance Hearing Officer for the Maricopa County Superior Court, Vernon Harris unsuccessfully sued the Superior Court and the other defendants for violations of, *inter alia*, his rights under Title VII of the Civil Rights Act and the Fourteenth Amendment. Defendants then sought substantial attorneys fees and costs from Harris, and were awarded over \$125,000 in fees and costs by the district court. Harris challenges those awards. Our laws encourage individuals to seek relief for violations of their civil rights, and allow a defendant to recover fees and costs from a plaintiff in a civil rights case only “in exceptional circumstances” in which the plaintiff’s claims are “frivolous, unreasonable or without foundation.” *See Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990) (internal quotation marks, citation omitted); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Moreover, only fees “attributable exclusively to plaintiff’s frivolous claims,” are recoverable by a defendant. *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1064 (9th Cir. 2006) (internal quotation marks, alterations and citation omitted). Because the district court both used an impermissible method of determining the amount of fees and costs to be assessed for the claims for which fees were appropriate, and erred in some of its determinations as to which claims were properly subject to a fee award to defendants, we vacate the award of attorneys fees and remand for a new award that complies with this opinion.

Liberal v. Estrada, No. 08-17360 (January 19, 2010) We affirm the district court’s order denying the officers’ motion for summary judgment on the ground of qualified immunity with respect to Plaintiff’s § 1983 claims. We also affirm the dis-

trict court’s order denying the officers’ motion for summary judgment on the ground of discretionary immunity under California Government Code section 820.2 with respect to Plaintiff’s false imprisonment claims. The remaining portions of the officers’ appeal are dismissed. The case is remanded to the district court for further proceedings.

Clairmont v. Sund Mental Health, No. 09-35856 (January 19, 2010) In this First Amendment retaliation case, Richard Clairmont appeals the district court’s grant of summary judgment to Defendant Joni Wilson, the Manager of Probation Services at the Seattle Municipal Court. Before filing suit, Clairmont was employed as a domestic violence counselor for Sound Mental Health, a private company that provides domestic violence prevention treatment programs to criminal defendants in Seattle. He alleges that he was fired in retaliation for giving truthful subpoenaed testimony in a criminal proceeding.

Although Clairmont was not employed directly by the Seattle Municipal Court, the district court determined that, because his employer was an independent contractor for the court, his First Amendment claim should be evaluated as if he were a public employee. Applying the *Pickering* public employee balancing test, the district court determined that the Seattle Municipal Court’s interests outweighed Clairmont’s First Amendment interests, and granted Wilson’s motion for summary judgment on the basis of qualified immunity. As we explain below, we agree with the district court that, for the purposes of this suit, Clairmont’s retaliation claim should be evaluated as if he were a public employee. We conclude, however, that Clairmont’s First Amendment interests outweigh the

NINTH CIRCUIT CASES

administrative interests of the Seattle Municipal Court and that his rights were clearly established at the time of the alleged violation. We therefore reverse and remand.

Northon v. Rule, No. 07-35319 (January 18, 2010)

In a true-crime book entitled *Heart Full of Lies*, author Ann Rule described in detail the killing by Liysa Northon of her husband, Christopher Northon. Liysa Northon, together with other members of her family, filed suit in an Oregon court against Rule and her publisher for defamation and false light invasion of privacy. Having already pled guilty to a charge of first degree manslaughter in an Oregon court, Liysa Northon did not dispute that she killed her husband, but she nonetheless contended that the book contained multiple misrepresentations.

Defendants removed the defamation action to federal district court and thereafter moved to dismiss Plaintiffs' claims under Oregon's anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") law, Or. Rev. Stat. § 31.150, et seq. "Anti-SLAPP statutes are designed to allow the early dismissal of meritless lawsuits aimed at chilling expression through costly, time-consuming litigation." *Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009) (citing *Verizon Del., Inc. v. Covad Commc'ns. Co.*, 377 F.3d 1081, 1090 (9th Cir. 2004)). The district court granted the Defendants' special motion to strike the Plaintiffs' claims and dismissed the case without prejudice. In a memorandum disposition, a screening panel of our court affirmed that dismissal by the district court.

Defendants subsequently filed a motion for attorneys' fees in connection with the appeal, citing Or. Rev. Stat. § 31.152(3), which provides that a defendant who prevails on an anti-SLAPP motion to strike shall be awarded reasonable attorneys' fees

and costs. Determining that the fee motion raised a potentially open question of law as to whether a fee award pursuant to a state anti-SLAPP law is governed by state or federal law, the original panel vacated both its initial order on the fee application and its previous decision regarding the underlying dismissal by the district court. The matter was reassigned to this panel to permit more detailed consideration. In a memorandum disposition filed simultaneously with this order, we again affirm the dismissal by the district court under the Oregon anti-SLAPP statute.

As for the Defendants' motion for attorneys' fees on appeal, we hold that Oregon state law governs the award of attorneys' fees on appeal in this case. State laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply to actions pending in federal district court when the fee award is "connected to the substance of the case." *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir. 1992).

The Wilderness Society v. United States Forest Service, No. 09-35200 (January 14, 2010)

Today we revisit our so-called "federal defendant" rule, which categorically prohibits private parties and state and local governments from intervening of right on the merits of claims brought under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* Because the rule is at odds with the text of Federal Rule of Civil Procedure 24(a)(2) and the standards we apply in all other intervention of right cases, we abandon it here. When construing motions to intervene of right under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions. To determine

NINTH CIRCUIT CASES

whether a putative intervenor demonstrates the “significantly protectable” interest necessary for intervention of right in a NEPA action, the operative inquiry should be, as in all cases, whether “the interest is protectable under some law,” and whether “there is a relationship between the legally protected interest and the claims at issue.” *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). Since the district court applied the “federal defendant” rule to prohibit intervention of right on the merits in this NEPA case, we reverse and remand so that it may reconsider the putative intervenors’ motion to intervene.

Howell v. Boyle, No. 09-36153 (January 14, 2010) Plaintiff Jean Howell filed suit in the United States District Court for the District of Oregon against Defendants Christopher Boyle and his employer, the City of Beaverton, Oregon (the City). Howell sought damages for injuries she sustained when Boyle, a police officer for the City, struck her with his police cruiser as she walked across a highway. At trial, the jury found that Howell and Boyle were each negligent and 50 percent responsible for the accident. After the district court reduced the jury’s award under Oregon’s comparative negligence law, it awarded Howell \$507,500 in damages. Boyle and the City asked the district court to cap damages at \$200,000 under the Oregon Tort Claims Act (the OTCA), Or. Rev. Stat. section 30.270(1) (2007), *repealed by* Or. Laws 2009, c. 67, § 20. The district court ruled that the OTCA damages cap was unconstitutional as applied to the case under the remedy clause in Oregon’s constitution, Or. Const. art. I, § 10, and declined to reduce Howell’s damages.

On appeal, Boyle and the City seek reversal of the district court’s ruling on the constitutionality of the OTCA damages cap as applied in this case.

First, they argue that Howell’s action is not protected by the remedy clause because her contributory negligence would have completely barred recovery of damages at common law. Second, they argue that, even if her action is protected by the remedy clause, \$200,000 is a constitutionally adequate substitute remedy for Howell’s damage award of \$507,500.

Accordingly, we respectfully certify the following questions to the Oregon Supreme Court:

1. Is Howell’s negligence action constitutionally protected under the Oregon constitution’s remedy clause, Or. Const. art. I, § 10, irrespective of the jury’s finding of comparative negligence? To what extent, if any, do the common law defenses to contributory negligence of last clear chance, the emergency doctrine, and gross negligence effect this determination?
2. If Howell’s action is protected, is \$200,000 an unconstitutional emasculated remedy despite the jury’s finding of comparative negligence? To what extent, if any, do the common law defenses to contributory negligence of last clear chance, the emergency doctrine, and gross negligence effect this determination?

Huff v. City of Burbank, No. 09-55239 (January 11, 2010) Plaintiffs George, Maria, and Vincent Huff appeal the district court’s judgment in favor of four officers who entered their home without a warrant. For the reasons below, we find that only two of the four officers were entitled to qualified immunity.

Both Zepeda and Ryburn knew that they were at

NINTH CIRCUIT CASES

the Huff house to investigate alleged threats that had been made by Vincent. They were aware that no crime had been committed at the Huff home. Both Zepeda and Ryburn knew that no crime was in progress at the Huff home. Both Zepeda and Ryburn were aware that they did not have probable cause to stop or detain Maria or Vincent. Both Zepeda and Ryburn knew that they had not been given consent to enter the Huff residence. Neither Zepeda nor Ryburn knew a gun to be present at the Huff home, ever saw a gun, or was ever informed of the presence of a gun. A reasonable officer confronted with this situation may have been frustrated by having a parent refuse them entry, but would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances. Thus, Ryburn and Zepeda are not entitled to qualified immunity for their warrantless entry into the Huff residence in violation of the Fourth Amendment.

Dawson v. Entek Int'l, No. 09-35844 (January 10, 2010) Shane Dawson (Dawson), a male homosexual, appeals the district court's grant of summary judgment in favor of his former employer, Entek International (Entek), on claims of discrimination arising from his termination. Entek is an Oregon-based company that manufactures polyethylene battery separators. On appeal, Dawson argues that the district court erred when it applied the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework to analyze state claims under Or. Rev. Stat. § 659A.030 for retaliatory discharge, sex hostile work environment, and sexual orientation hostile work environment. Dawson also claims that the district court erred when it granted summary judgment in Entek's favor on Dawson's claims of retaliatory discharge and sex hostile work environment under both Title VII and Or. Rev. Stat. § 659A.030, as well as sexual orientation hostile work environment under Or. Rev.

Stat. § 659A.030. Finally, Dawson alleges that the district court erred when it granted summary judgment against Dawson on his claim of intentional infliction of emotional distress.

Viewing the evidence in the light most favorable to the nonmoving party, Dawson produced circumstantial evidence of retaliatory discharge and sexual orientation hostile work environment, such that resolution of this action by summary judgment was error. We reverse and remand.

Chapman v. Pier One Imports (USA), Inc., No. 07-16326 (January 7, 2010) We now clarify that when an ADA plaintiff has suffered an injury-in-fact by encountering a barrier that deprives him of full and equal enjoyment of the facility due to his particular disability, he has standing to sue for injunctive relief as to that barrier and other barriers related to his disability, even if he is not deterred from returning to the public accommodation at issue. First, we hold that an ADA plaintiff can establish standing to sue for injunctive relief either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant facility. Second, we hold that an ADA plaintiff who establishes standing as to encountered barriers may also sue for injunctive relief as to unencountered barriers related to his disability. Here, however, Chapman has failed to allege and prove the required elements of Article III standing to support his claim for injunctive relief under the ADA. Specifically, he has not alleged or proven that he personally suffered discrimination as defined by the ADA as to encountered barriers on account of his disability.

Hooper v. County of San Diego, No. 09-55954 (January 4, 2010) Deborah Hooper appeals the

NINTH CIRCUIT CASES

district court’s grant of summary judgment to defendants on her excessive force claims. The district court held that Hooper’s § 1983 claim was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), as a result of her conviction for resisting a peace officer under California Penal Code § 148(a)(1). We reverse the district court’s decision on Hooper’s § 1983 claim.

The question before us is the basic *Heck* question—whether success in Hooper’s § 1983 claim that excessive force was used during her arrest “would ‘necessarily imply’ or ‘demonstrate’ the invalidity” of her conviction under § 148(a)(1). *Smith*, 394 F.3d at 695. Given California law, as clarified by *Yount*, we hold that it would not. The chain of events constituting Hooper’s arrest was, in the words of the Court in *Yount*, “one continuous transaction.” A holding in Hooper’s § 1983 case that the use of the dog was excessive force would not “negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper’s] attempt to resist it [when she jerked her hand away from Deputy Terrell].” *Yount*, 43 Cal. 4th at 899 (quoting *Jones*, 197 F. Supp. 2d at 1005 n.9).

Trunk v. Jewish War Veterans, No. 08-56415 (January 4, 2010) The forty-three foot cross (“Cross”) and veterans’ memorial (“Memorial”) atop Mount Soledad in La Jolla, California, have generated controversy for more than twenty years. During this time, the citizens of San Diego (where La Jolla is located), the San Diego City Council, the United States Congress, and, on multiple occasions, the state and federal courts have considered its fate. Yet no resolution has emerged.

Indeed, we believe that no broadly applauded resolution is possible because this case represents the difficult and intractable intersection of relig-

ion, patriotism, and the Constitution. Hard decisions can make good law, but they are not painless for good people and their concerns.

Accordingly, after examining the entirety of the Mount Soledad Memorial in context—having considered its history, its religious and non-religious uses, its sectarian and secular features, the history of war memorials and the dominance of the Cross—we conclude that the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause. This result does not mean that the Memorial could not be modified to pass constitutional muster nor does it mean that no cross can be part of this veterans’ memorial. We take no position on those issues. We reverse the grant of summary judgment to the government and remand for entry of summary judgment in favor of the Jewish War Veterans and for further proceedings consistent with this opinion.

Enyart v. National Conference of Bar Examiners, No. 10-15286 (January 4, 2010) Stephanie Enyart, a legally blind law school graduate, sought to take the Multistate Professional Responsibility Exam and the Multistate Bar Exam using a computer equipped with assistive technology software known as JAWS and Zoom-Text. The State Bar of California had no problem with Enyart’s request but the National Conference of Bar Examiners refused to grant this particular accommodation.

Enyart sued NCBE under the Americans with Disabilities Act seeking injunctive relief. The district court issued preliminary injunctions requiring NCBE to allow Enyart to take the exams using the assistive software, and NCBE appealed. We hold that in granting the injunc-

NINTH CIRCUIT CASES

tions, the district court did not abuse its discretion. We affirm.

Guggenheim v. City of Goleta, No. 06-56306 (December 22, 2010) We address the viability of a takings claim arising out of a rent control ordinance affecting mobile home parks.

Returning to federal court, the Guggenheims won summary judgment, and the City appealed. While the appeal was pending, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*, and the Guggenheims and the City agreed that *Lingle* so undermined the district court judgment that they stipulated to dismiss the appeal and they reopened the litigation in district court. This time the City won summary judgment, and the Guggenheims appeal.

The district court observed that the Guggenheims “got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent-control ordinance.” We reversed, but decided to rehear the case en banc, and now vacate our earlier decision and affirm. Whether the City of Goleta’s economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis. Students in Economics 101 have for many decades learned that rent control causes the higher rents and scarcity it is meant to alleviate, but the Due Process Clause does not empower courts to impose sound economic principles on political bodies.

Tamas v. Dep’t of Social and Health Servs., No. 08-35862 (December 22, 2010) Enrique Fabregas

(Fabregas) is a predator who slithered into the lives of vulnerable women with young daughters. There is no question that Fabregas molested his foster daughters, one of whom he legally adopted. The more challenging question this case presents is whether the State of Washington Department of Social and Health Services (DSHS) and nine DSHS employees’ involved in overseeing the foster care of Monica (Monica), Ruth Tamas (Ruth), and Estera Tamas (Estera) are legally responsible for the injuries inflicted by Fabregas.

Monica, Ruth, and Estera (Appellees) filed a lawsuit against DSHS and nine of its employees (Appellants) alleging negligence and civil rights violations under 42 U.S.C. § 1983. Appellants filed a summary judgment motion asserting that the individual DSHS employees were entitled to absolute and qualified immunity. Appellants challenge the district court’s denial of their motion. Because the district court did not apply the correct standard in assessing whether qualified immunity applies, we vacate the district court’s judgment and remand this case for application of the correct standard, and for separate analysis of each Appellant’s prospective liability.

United States v. City of Arcata, No. 09-16780 (November 4, 2009) Two local ordinances, the Arcata Youth Protection Act and the Eureka Youth Protection Act, prohibit agents or employees of the federal government from engaging in military recruitment activities targeting minors. The United States sued to bar enforcement of the ordinances. The district court granted the government’s motion for judgment on the pleadings and permanently enjoined the cities of Arcata and Eureka from enforcing the ordinances. For the reasons stated below, we affirm.

NINTH CIRCUIT CASES

Lowe v. Washoe County, No. 09-15759 (December 16, 2010) Plaintiffs Todd Lowe, Janet Lowe, Tom Henderson, Nancy Henderson, J. Robert Anderson, Carole Anderson, Dean Ingemanson, Kathy Nelson, and Arthur Berliner own residential real property in Incline Village and Crystal Bay, which are communities located on the North Shore of Lake Tahoe in Washoe County, Nevada. As the putative representatives of a class of approximately 9,000 Incline Village and Crystal Bay property owners, the nine plaintiffs filed a complaint under 42 U.S.C. § 1983 in federal district court against Defendants Washoe County, Washoe County Assessor Josh Wilson, and Washoe County Treasurer Bill Berrum. Plaintiffs allege that the valuation of their Nevada real property used to calculate their ad valorem property taxes for the 2008-09 taxable year violated both the Nevada Constitution and the Due Process Clause of the U.S. Constitution. They seek declaratory, injunctive, and other appropriate relief. The district court dismissed the complaint for lack of subject matter jurisdiction pursuant to the Tax Injunction Act (the “Act”), 28 U.S.C. § 1341, because a “plain, speedy and efficient remedy” is available in state court. Reviewing *de novo*, *A-1 Ambulance Serv., Inc. v. California* 202 F.3d 1238, 1242-43 (9th Cir. 2000), we affirm.

Norse v. City of Santa Cruz, No. 07-15814 (December 15, 2010) When Robert Norse gave the Santa Cruz City Council a silent Nazi salute, he was ejected and arrested. He sued city officials for violating his rights under the First Amendment. On the eve of trial, the district court sua sponte granted judgment against him, holding that the city officials were entitled to qualified immunity. Because the district court failed to provide Norse adequate notice and opportunity to be

heard, among other procedural errors, we reverse the judgment of the district court.

Krottner v. Starbucks Corp., No. 09-35823 (December 14, 2010) Plaintiffs-Appellants Laura Krottner, Ishaya Shamas, and Joseph Lalli appeal the district court’s dismissal of their negligence and breach of contract claims against Starbucks Corporation. Plaintiffs-Appellants are current or former Starbucks employees whose names, addresses, and social security numbers were stored on a laptop that was stolen from Starbucks. Their complaints allege that, in failing to protect Plaintiffs-Appellants’ personal data, Starbucks acted negligently and breached an implied contract under Washington law.

Affirming the district court, we hold that Plaintiffs-Appellants, whose personal information has been stolen but not misused, have suffered an injury sufficient to confer standing under Article III, Section 2 of the U.S. Constitution. We affirm the dismissal of their state-law claims in a memorandum disposition filed contemporaneously with this opinion.

PEST Comm. v. Miller, No. 09-17002 (December 1, 2010) This appeal arises from the unsuccessful efforts by a group of organizations and individuals who desire to use Nevada’s initiative and referendum process to effectuate changes in Nevada law by placing initiatives on the Nevada ballot. These groups brought suit in federal court, asserting that certain of Nevada’s statutory requirements for ballot initiatives and referenda violate federal constitutional rights. The district court granted summary judgment in favor of Defendant Ross Miller, the Secretary of State for the state of Nevada. It determined that

Krollontrack.com

Nevada's statutory single-subject, description-of-effect, and pre-election challenge provisions do not impose a severe burden on First Amendment rights, are permissible regulations of the state's electoral process, and are not unconstitutionally vague. We affirm because we conclude that the district court did not err in dismissing Appellants' claims.

KROLL ONTRACK

Court Upholds Government's Search and Seizure Despite Acknowledging Right to Privacy in E-Mail Communications

United States v. Warshak, 2010 WL 5071766 (C.A.6 (Ohio) Dec. 14, 2010). In this criminal case, the defendants appealed their numerous convictions for fraud claiming the government violated the Fourth Amendment prohibition against unreasonable search and seizures by obtaining private e-mails without a warrant. The defendants also argued that the government turned over immense quantities of discovery in a disorganized and unsearchable format, that the government violated its obligations by producing "gargantuan 'haystacks' of discovery" and that the district court erroneously denied a 90-day continuance to allow the defendants to finish sifting through the "mountains of discovery." Addressing the Fourth Amendment concerns, the court first found the defendant plainly manifested an expectation that his e-mails would remain private given the sensitive and "sometimes damning substance" of the e-mails, viewing it as highly unlikely the defendant expected the e-mails to be made public as people "seldom unfurl their dirty laundry in plain view." Next, the court determined that it would defy common sense to treat e-mails differently than more traditional forms of communication and found that neither the possibility nor the right of access by the

Internet Service Provider (ISP) is decisive to the issue of privacy expectations. Based on these conclusions, the court held the government may not compel an ISP to turn over e-mails without obtaining a warrant first. However, the court ultimately found the government relied in good faith on the Stored Communications Act in obtaining the e-mails and determined the exclusionary rule does not apply. Turning to the "prodigious" volume of discovery that consisted of millions of pages, the court disagreed with the defendants' arguments, noting in particular that Fed.R.Crim.P. 16 is silent on what form discovery must take.

Court Denies Spoliation Sanctions Citing No Duty to Preserve

Huggins v. Prince George's County, Maryland, 2010 WL 4484180 (D. Md. Nov. 9, 2010). In this civil rights litigation, the plaintiff sought to modify a previously denied motion for spoliation sanctions, alleging a key county administrator's e-mail account had been deleted and purged in violation of its preservation obligations. Reviewing the magistrate judge's original findings, the court agreed that the duty to preserve did not arise until a year after the administrator's employment ended and six months after his account was deleted in accordance with the county's standard operating procedure. Despite the fact that the administrator was a "key player" in the litigation, the court affirmed the absence of a culpable state of mind as the e-mail account was deleted "pursuant to a neutral policy" when no preservation duty existed. Finally, the court found that because the administrator's involvement was peripheral, the damage from losing his e-mails was "in light of all available evidence" - a finding supported by the plaintiff's failure to reference him in the original

Krollontrack.com

action despite awareness of his role. Accordingly, the court denied the motion for sanctions.

Court Recommends Terminating Sanctions for Repeated Willful & Bad Faith Discovery Abuses

The Sunrider Corp. v. Bountiful Biotech Corp., 2010 WL 4590766 (C.D. Cal. Oct. 8, 2010). In this intellectual property litigation, the plaintiffs renewed their motion for terminating sanctions, alleging the defendant repeatedly perjured himself in an effort to thwart discovery, failed to comply with self-executing discovery obligations imposed by the federal rules and failed to comply with discovery orders. Analyzing the appropriateness of terminating sanctions, the court found the defendant acted with “disingenuousness, dishonesty, disregard of discovery obligations, and disobedience of court orders.” Further, the court found prejudice to the plaintiff in that the defendant willfully and repeatedly gave perjurious testimony and other non-credible sworn statements, failed to produce (or belatedly and incompletely produced) responsive documents, breached his duty to supplement discovery responses and failed to comply with a discovery order requiring him to provide information relevant to evidence spoliation. In addition, the caretaker entrusted with the defendant’s personal and business affairs destroyed and failed to preserve documents, leaving no method to determine what documents were destroyed. Finding that the responsive documents were within the defendant’s possession, custody or control, the court determined the defendant breached his duty to preserve and recommended the motion for terminating sanctions be granted, the defendant’s answer be stricken and default judgment be entered against the defendant.

Court Orders Production of Backup Tape ESI Subject to Fed.R.Evid. 502(d) Order

Radian Asset Assurance, Inc. v. College of the Christian Brothers of New Mexico, 2010 WL 4928866 (D. N.M. Oct. 22, 2010). In this litigation, the plaintiff objected to a proposed court order that would require the defendants to produce e-mails and other ESI from backup tapes subject to a clawback agreement, claiming the defendants should be required to search its own ESI and produce responsive documents – not shift the burden and cost to the plaintiff to do so. Disagreeing with the plaintiff’s arguments, the court determined the backup tapes were not reasonably accessible and found there to be good cause to issue a protective order due to the significant expense in restoring and searching the tapes in light of their largely irrelevant content. Thus, the court ordered the defendants to produce copies of all ESI from the backup tapes for the plaintiff to review, dismissing the plaintiff’s arguments that this constituted a document dump. The court also ordered the defendants to produce user logs for 135 hard drives to determine which one (if any) belonged to a particular defendant. Both the production of the backup tapes and hard drive were subject to a Fed.R.Civ.P. 502(d) order.

Court Declines to Issue Confidentiality Order Absent Verification of Production Challenges

In re Fontainebleau Las Vegas Contract Litigation, 2010 WL 4281808 (S.D. Fla. Oct. 25, 2010). In this discovery dispute, the producing party sought entry of a confidentiality order,

Krollontrack.com

arguing it would be impossible for the producing party's attorney to review all of the documents before the deadline. Disagreeing, the court recalled counsel's earlier assurance that running a privilege review on the e-mail server with agreed-upon search terms would take less than a day and found no explanation "why an attorney would need to personally examine 'hundreds of thousands of documents'" since the producing party previously represented that its e-discovery vendor was prepared to do exactly that. Further, the court found that the producing party's proposal, which would place the burden on the requesting parties to return all of the documents copied off the servers, would risk disclosing attorney work product. Denying the confidentiality order request, the court noted the producing party may seek an extension of production deadlines via a verified motion if more time is needed to produce the privilege log.

Court Denies Sanctions for Spoliation Absent Proof of Relevance

Orbit One Commc'ns, Inc. v. Numerex Corp., 2010 WL 4615547 (S.D. N.Y. Oct. 26, 2010). In this corporate litigation, the defendant sought spoliation sanctions. Discussing preservation obligations, the court criticized the standard of "reasonableness and proportionality" articulated in and as "too amorphous to provide much comfort to a party deciding" what to retain. Instead, the court advised parties to adhere to the standard of retaining "all relevant documents...in existence at the time the duty to preserve attaches." Noting that ordinary negligence is sufficient in its circuit for a spoliation inference, the court found the plaintiffs did not adhere to appropriate preservation procedures by implementing an inadequate litigation hold, failing to involve a key IT employee, entrusting data to the individual with the greatest incentive to destroy it and allowing "cavalier" treatment

of that information. Nevertheless, the court asserted that although a party's preservation efforts may be insufficient, sanctions are not warranted unless there is proof that some information has actually been lost and was relevant. In so holding, the court also noted it respectfully disagreed with the ruling that held some level of sanctions are warranted as long as any information was lost due to inadequate preservation practices. Despite the plaintiffs' failure to "engage in model preservation" of ESI, the court denied the sanctions request determining there was insufficient evidence that any relevant information was destroyed.

Court Issues Sanctions Amount, Modifies Judge Grimm's Order in Victor Stanley II

Victor Stanley, Inc. v. Creative Pipe, Inc., Case 8:06-cv-02662-MJG (D. Md. Nov. 1, 2010). In this intellectual property litigation, the defendants appealed Magistrate Judge Grimm's order from September 9, 2010 holding the defendant President in contempt of court and ordering a two-year imprisonment unless and until attorney fees and costs were paid. Agreeing with Judge Grimm's recommendation, the court adopted the decision except as to the order for imprisonment. Declining to address the possibility of referral for criminal prosecution at this time, the court found it inappropriate to order incarceration for the possible future failure to comply with an as-yet-undetermined payment obligation. The court ordered the defendants to pay \$337,796.37 by the end of the week, constituting the minimum amount of sanctions imposed, and referred to Judge Grimm the matter of determining any additional amount payable. In the event this payment was not made, the defendants would be required to appear in court to

Krollontrack.com

show cause why they should not be held in civil contempt for their failure to comply with the order, and additional failures may permit a warrant for the defendant President's arrest.

Court Waives Privilege for Insufficient Efforts to Prevent Inadvertent Disclosure

Kmart Corp. v. Footstar, Inc., 2010 WL 4512337 (N.D. Ill. Nov. 2, 2010). In this insurance indemnification litigation, the defendants sought sanctions and a protective order regarding inadvertently produced privileged documents. Conducting the privilege analysis using Fed.R.Evid. 502, the court found that the documents at issue were privileged and inadvertently produced but determined that the defendants failed to take reasonable steps to prevent disclosure or seek their return in a timely manner. The court found that the number of privileged documents was small relative to the total production (less than 3% of the 4,500 materials produced), and a large percentage of the documents were easily identifiable as non-privileged as they were public court documents, leaving only a fraction that would have demanded more extensive review. Furthermore, the defendants did not employ "software used to prevent disclosure, [or] any sort of records management system" to screen the documents. The defendants' efforts to rectify the error were also insufficient, as they failed to retrieve them until twelve days after their discovery at a deposition. Based on this analysis, the court denied the protective order and determined the defendants were not entitled to reclaw the material. The court also denied sanctions, finding the plaintiff made no misrepresentations regarding the privileged documents.

Court Finds Counsel Should Have Been Aware of Need for More Substantial Discovery Effort

Sofaer Global Hedge Fund v. Brightpoint, Inc., 2010 WL 4701419 (S.D. Ind. Nov. 12, 2010). In this corporate litigation, the defendants sought to compel production to which the plaintiff objected claiming that producing documents from the French corporation's possession would violate French law, that some of the sought-after documents do not exist and that it should not be required to search for documents in files other than those in possession of its principal. Addressing these arguments, the court found the documents belonging to the wholly-owned French subsidiary to be within the plaintiff's control and cited the lack of arguments given regarding the potential violation of French law in ordering their production. Next, the court determined that the search of the principal's files – by the principal himself – was not thorough based on "the paucity of documents" found and ordered the plaintiff to search electronic and paper files of additional employees. Addressing the issue of sanctions, the court held that "the scant amount" of documents acquired through the plaintiff's search process, the inability to locate highly relevant and responsive documents and the overall resistance to discovery, "should have alerted counsel that a more substantial effort must be made to search for and locate responsive documents," and awarded partial attorney fees accordingly.

Court Limits Scope of Discovery and Orders Production of Privilege Log

Corbello v. Devito, 2010 WL 4703519 (D. Nev. Nov. 12, 2010). In this intellectual property litigation, the court considered several discovery motions filed by both parties, including the requested production of native files, e-mail com-

Krollontrack.com

munications and privilege logs. The court had previously “admonished counsel regarding their lack of cooperation concerning electronically stored information and the exchange of attacks,” and in an attempt to settle the ongoing discovery disputes, ordered the parties to file a joint status report following a meet and confer session. Despite making significant progress, the parties were unable to reach a resolution, leaving several issues before the court. Addressing these motions, the court denied the request for native files as “an unjustifiable waste of time and resources” because the requested information was already produced in PDF form, which constituted a reasonably useable format. Regarding the requested e-mail communications, the court agreed with the defendants that the scope of the request and bulk of information available warranted a temporal limitation on discovery. Finally, the court ordered the defendants to produce a privilege log within thirty days of the order.

Court Denies Belated Motion for Native Production

Brinckerhoff v. Town of Paradise, 2010 WL 4806966 (E.D. Cal. Nov. 18, 2010). In this employment discrimination litigation, the parties moved to compel discovery and production, obtain protective orders and impose sanctions. Among its motions to compel, the plaintiff sought production of responsive e-mails in their native format. Although the Federal Rules of Civil Procedure do not require a party to produce e-mails in their native format, the court noted this does not permit the party to produce the information in a form that “makes it more difficult or burdensome for the requesting party to use...efficiently.” The court acknowledged that both parties possess a mutual obligation to discuss electronic discovery at the Rule 26(f) conference and considered the plaintiff’s failure to address e-discovery in both the conference

and in her production requests. The belated request for native production along with the determination that the plaintiff would not be “hard pressed” to review the approximately 4,000 pages of e-mails produced, led the court to deny the plaintiff’s request with the exception of one document – for which the metadata would likely reveal useful information. Admonishing both parties for exhibiting unprofessional conduct, the court denied sanctions.

Preparing for Cell Phone Data Discovery

Cell phones are ubiquitous, and the data they hold may be critical to an investigation or litigation. In the recent case *United States v. Suarez*, 2010 WL 4226524 (D. N.J. Oct. 21, 2010), the court held that the Government violated its duty to preserve relevant text messages sent between a cooperating witness and FBI agents when the Government failed to retrieve the messages from the cell phones or from the FBI’s network system. Ultimately, the court sanctioned the Government with an adverse inference instruction for the spoliation of discoverable data.

When the duty to preserve arises, it can be difficult to know how and what mobile device data must be included and what extra steps are needed to ensure relevant data is not lost. Preserving all data on every cell phone involved in an incident can be difficult and is sometimes not possible. Therefore, smart decisions must often be made quickly to determine which data to target and which methods to use in order to retrieve that data. Two important steps an organization should take include gaining an understanding of the unique nature of mobile device

Krollontrack.com

data collections and taking proactive measures to prepare for the event of litigation.

Data collections from cell phones differ considerably from those involving ordinary computer hard drives. Unlike desktop computers that use hard drives, cell phones rely on flash memory, which is smaller and in turn causes information to be written over more rapidly. This makes the data on cell phones more volatile and susceptible to overwriting, which in turn makes recovery of relevant data more difficult and time sensitive. Because cell phones are ever-changing devices, processing typically results in a snapshot of the data on the device at a specific point in time. Timeliness is therefore essential to preserve data that may be lost when a cell phone battery dies or to prevent the data from being overwritten through further usage of the device.

The methods available to process cell phones vary greatly depending on the make, model and carrier involved. What makes data recovery on these devices so difficult is the fact that there are a multitude of different and proprietary types of cell phones, all operating on different carrier networks. Phones containing proprietary technology require unique cables and adapters to extract data. In addition, the same exact phone may exhibit different data recovery potential depending upon the cellular network for which it is configured. Though cell phones may look identical on the outside, they are often exceedingly different internally, and this can sometimes lead to unexpected results for the inexperienced examiner.

Some categories of data may also require unique methods. While mobile device data may be synchronized with a corporate system that enables data retrieval (such as the Blackberry® Enterprise Server), the kinds of data available may vary with different systems. Also, various network or service providers may not necessarily provide the

same storage systems or the ability to access the same kinds of data. For example, while e-mails sent from a cell phone over a company server may be available and stored on a corporate network, records of phone calls sent and received usually are not.

Even after a successful collection, the data that is extracted from a given device may require manual analysis techniques and tools to interpret and read. In other words, the recovered data may not appear as plain and easy to read text, but as fragmented data that can be difficult to display for use by attorneys, judges and juries.

On the front end, the most essential steps an organization can take are effective research and planning in selecting which new technologies to invest in. It is important to consider what data will be available for collection and what equipment, software and techniques may be required for preservation. Involving legal counsel along with IT in this process will be beneficial, as counsel can decide in advance the types of data that may need to be preserved and collected when litigation ensues. Because different kinds of data are more easily retrieved on certain types of devices than others, considering in advance the ease with which you will be able to retrieve images, call logs, text messages (such as MMS and SMS), audio and video will make your litigations run more smoothly on the back end.

The legal standard concerning the duty to preserve evidence is fairly straightforward - when litigation is reasonably foreseeable, the duty to preserve relevant evidence arises. The more challenging questions concern what is or may be relevant, what must be done to preserve such evidence and evaluating whether the proper preservation steps were taken in any given

Krollontrack.com

situation. Once a request for information has been made, there is a duty to preserve it unless it is not relevant or the court agrees that it is too expensive, time-consuming or difficult to preserve.

To date there are still relatively few rulings on the admissibility of cell phone data, but the question is certainly arising more frequently in cases across many jurisdictions. Related questions increasingly confronting the courts involve company data retention policies and employee privacy issues relating to mobile device use. These questions cross over into determining what mobile device data is and is not discoverable. Undoubtedly, these sometimes contentious issues will continue to play out in courts in the months and years ahead.

Although the latest technologies are savvy and smart, the tools needed for cell phone data collections take some time to catch up. Data might be retrievable on older devices that cannot yet be recovered from newer ones. In addition, some devices can be remotely accessed or wiped using new "apps" with advanced features. The question often arises for management: "Should we standardize on a slightly older phone that is better understood in terms of what data can be recovered from it, or on the newest phone technology that may be less understood, but may also offer a greater selection of advanced applications to make our employees more productive?" This is a business decision for each com-

pany to make according to its own unique environment, and it can only be made intelligently when the security and data recovery characteristics of each device are sufficiently understood.

Ultimately, and in contrast to hard drive collections, more equipment and expert knowledge about different types of cell phones is required to perform successful collections. When organizations

anticipate mobile device data collections, an expert provider can be consulted in order to plan for the effective preservation and collection of the data. Among their arsenal of techniques, experts have the benefit of advanced



SORRY, SON...THERE'S NO APP FOR THAT

testing. Moreover, in the event that an opponent challenges any preservation or collection practice, an expert can walk a court through the process of what was done, how, and why it was done, and explain the techniques used in order to help insure that extracted data will be admissible. Organizations should select a service provider who is prepared to accomplish these objectives.