

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Maestas v. State, 128 Nev. Adv. Op. No. 12 (March 29, 2012) – The Court affirms a judgment of conviction of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and burglary while in the possession of a deadly weapon and an order denying a motion for new penalty trial in a death penalty case based upon a guilty plea, ruling that none of appellant’s claims warrant relief. First, the Court rules that although NRS 175.556 allows the district court to choose between imposing a life-without-parole sentence and impaneling a new jury to determine the sentence when a jury is unable to reach a unanimous penalty verdict, the statute does not violate the Eighth Amendment because it does not afford the district court the discretion to impose a death sentence (that determination is left to the new jury, guided by the requirements set forth in NRS 175.554). Second, the

Court rules that the district court did not abuse its discretion by denying a motion for a new trial alleging that the jury foreperson committed misconduct by expressing her views on the meaning of a life sentence without the possibility of parole based on her special knowledge as a 9-1-1 dispatcher and by concealing a bias against appellant, since no misconduct or bias was proved.

Holiday Retirement Corp. v. State, DIR, 128 Nev. Adv. Op. No. 13 (April 5, 2012) – The Court affirms a district court order denying a petition for judicial review in a workers’ compensation action, ruling that the district court did not err in denying judicial review because an employer is required to acquire knowledge of an employee’s permanent physical impairment before a subsequent injury occurs to qualify for reimbursement from the subsequent injury account for private carriers under NRS

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Brett Kandt,
Chair



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616B.587(4) (adopting the view of the majority of jurisdictions).

Rodriguez v. State, 128 Nev. Adv. Op. No. 14 (April 5, 2012) – The Court affirms a jury conviction of conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, coercion with the use of a deadly weapon, possession of a credit or debit card without the cardholder’s consent, and obtaining or using personal identifying information of another. First, the Court rules that 1) text messages are subject to the same authentication requirements under NRS 52.015(1) as other documents, including proof of authorship; 2) the district court abused its discretion in admitting 10 of the 12 text messages that the State claimed were sent by the appellant, a codefendant, or both using the victim’s cell phone because the State failed to present sufficient evidence corroborating the appellant’s identity as the person who sent the 10 text messages; and 3) the error was harmless. Second, the Court examines whether testimony that a defendant could not be excluded as the source of a discovered DNA sample is admissible in the absence of supporting statistical data reflecting the percentage of the population that could be excluded as the source of the discovered DNA sample and holds that 1) so long as it is relevant, DNA nonexclusion evidence is admissible because any danger of unfair prejudice or of misleading the jury is substantially outweighed by the defendant’s

ability to cross-examine or offer expert witness evidence as to probative value; and 2) the district court did not abuse its discretion by admitting the relevant DNA nonexclusion evidence.

In re Parental Rights as to C.C.A., 128 Nev. Adv. Op. No. 15 (April 5, 2012) – The Court reverses a district court order terminating appellant’s parental rights as to the minor child, ruling that because the district court failed to identify, in writing or on the record, the factual bases that support its termination order, the Court cannot determine whether substantial evidence supports the district court’s decision, and thus, the district court’s order must be reversed and the case remanded to the district court to enter its findings [citing Robison v. Robison, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (remanding the case to the lower court because the court’s findings failed to indicate the factual basis for its final conclusions)].

Haley v. Dist. Ct., 128 Nev. Adv. Op. No. 16 (April 5, 2012) – The Court grants in part and denies on part a writ petition challenging a district court order approving the compromise of a minor’s claim in a medical malpractice action but directing a different distribution of the settlement proceeds than that agreed to by the parties. The Court notes that NRS 41.200, Nevada’s statute governing the compromise of a minor’s claim, leaves the allocation of fees and costs to the district court’s discretion, and rules that the district court may adjust the terms of the settlement in accordance with the minor’s best interest. However, because the district court in this case provided no explanation for the

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allocation of fees between the attorney and the guardian ad litem, the Court grants the issuance of a writ instructing the district court to provide a distribution of the settlement proceeds that fairly and reasonably accounts for duties performed by those individuals.

MountainView Hospital v. Dist. Ct., 128 Nev. Adv. Op. No. 17 (April 5, 2012) – The Court grants in part a writ petition challenging the district court’s denial of a motion to dismiss a medical malpractice action, ruling that the absence of a properly executed jurat does not render a medical expert’s written statement insufficient to meet the affidavit requirement of NRS 41A.071, and instructing the district court to conduct an evidentiary hearing for the limited purpose of determining whether the expert’s written statement was made under oath.

Jones v. SunTrust Mortgage, Inc., 128 Nev. Adv. Op. No. 18 (April 26, 2012) – The Court affirms a district court order denying judicial review in a foreclosure mediation matter, ruling that when an agreement is reached as a result of a mediation in Nevada’s Foreclosure Mediation Program (FMP), the parties sign the agreement, and it otherwise comports with contract law principles, the agreement is enforceable under District Court Rule 16. The Joneses had sought sanctions against SunTrust on the basis that SunTrust violated NRS 107.086 and the Foreclosure Mediation Rules (FMRs) by failing not providing copies of any assignments at the foreclosure mediation. The Court found that 1) substantial evidence

supported the district court’s finding that the mediator’s statement containing the written short-sale terms, signed by all parties, constitutes an enforceable settlement agreement; 2) the short-sale agreement was supported by consideration, since SunTrust agreed to suspend the foreclosure proceedings against the Joneses for two months in exchange for the Joneses’ agreement to a short sale; and 3) the parties expressly agreed to foreclosure in the event that the short sale did not take place.

State v. Huebler, 128 Nev. Adv. Op. No. 19 (April 26, 2012) – The Court reverses an order of the district court granting relief on a post-conviction petition for a writ of habeas corpus, ruling that 1) the State is required under Brady v. Maryland, 373 U.S. 83 (1963), to disclose material exculpatory evidence within its possession to the defense before the entry of a guilty plea; 2) when the State fails to make the required disclosure, the defendant may challenge the validity of the guilty plea on that basis; 3) to succeed, the defendant must demonstrate the three components of a Brady violation in the context of a guilty plea: that the evidence at issue is exculpatory, that the State withheld the evidence, and that the evidence was material; 4) as to the materiality component, the test is whether there is a reasonable probability or possibility (depending on whether there was a specific discovery request) that but for the State’s failure to disclose the evidence the defendant would have refused to plead guilty and would have gone to trial; and 5) Huebler failed to demonstrate that he would have refused to plead guilty and would have gone to trial had the evidence

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been disclosed before the plea.

Schettler v. RalRon Capital Corporation, 128 Nev. Adv. Op. No. 20 (May 3, 2012) – The Court reverses a district court summary judgment in a contract action involving analysis of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821 (2006), an act that governs the disposition of failed financial institutions' assets. The Court rules that 1) FIRREA divests a court of jurisdiction to consider any defense or affirmative defense not first adjudicated through FIRREA's claims process; 2) while FIRREA's jurisdictional bar divests a district court of jurisdiction to consider claims and counterclaims asserted against a successor in interest to the Federal Deposit Insurance Corporation (FDIC not first adjudicated through FIRREA's claims process; 3) the jurisdictional bar does not apply to defenses or affirmative defenses raised by a debtor in response to the successor in interest's complaint for collection; and 4) in this case, an affirmative defense raised unresolved questions of material fact, and because affirmative defenses are not barred by FIRREA, the district court erred in granting summary judgment in favor of RalRon on its breach of contract and breach of personal guaranty claims.

Club Vista Financial Servs. v. Dist. Ct., 128 Nev. Adv. Op. No. 21 (May 17, 2012) – The Court grants in part a writ petition challenging a district court order permitting real parties in interest to depose petitioners' trial attorney, ruling that a party to a lawsuit seeking to depose an opposing party's former attorney must demonstrate

that the information sought cannot be obtained by other means, is relevant and nonprivileged, and is crucial to the preparation of the case [citing Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986)], and directing the district court to evaluate the underlying facts and circumstances of the request for a protective order in light of the three-factor test set forth in Shelton.

In re State Engineer Ruling No. 5823, 128 Nev. Adv. Op. No. 22 (May 31, 2012) – The Court vacates a district court order dismissing a petition for judicial review of the State Engineer's ruling in a water rights action, on the basis that the district court read NRS 533.450(1) too restrictively, and remands for further proceedings consistent with the Court's opinion. The statute affords judicial review "in the nature of an appeal" to "[a]ny person feeling aggrieved by any order or decision of the State [Water] Engineer . . . affecting the person's interests" and requires that any such appeal "must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated" Specifically, the district court was incorrect in holding that 1) "matters affected" refers only to the point of diversion of the applicants' existing or proposed water rights; and 2) filing for review in an improper county does not just misplace venue, a defect that may be cured or waived, but defeats subject matter jurisdiction, requiring dismissal.

Winn v. Sunrise Hospital & Medical Center, 128 Nev. Adv. Op. No. 23 (May 31, 2012) – The Court affirms in part and

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vacates in part a district court summary judgment in a medical malpractice action, ruling that 1) the accrual date for NRS 41A.097(2)'s one-year discovery period ordinarily presents a question of fact to be decided by the jury; 2) only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law; 3) because questions of fact remain as to whether subsection 2's one-year discovery period was tolled for concealment against respondent Sunrise Hospital and Medical Center, the district court's summary judgment in this regard is vacated and remanded for further proceedings; and 4) however, because subsection 3's tolling-for-concealment provision does not apply against respondents Michael Ciccolo, M.D.; Clinical Technician Associates, LLC; Robert Twells, CCP; and Lee P. Steffen, CCP, the district court's summary judgment in their favor is affirmed.

Whitehead v. State, 128 Nev. Adv. Op. No. 24 (May 31, 2012) – The Court grants a petition for en banc reconsideration of an appeal from an order dismissing a post-conviction petition for writ of habeas corpus arising from a case in which petitioner pleaded guilty to DUI causing death and DUI causing substantial bodily harm. Petitioner contends that a panel of the Court overlooked NRS 176.105(1) and whether a judgment of conviction that imposes restitution but leaves the amount of restitution to be determined is final for purposes of triggering the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. The Court re-

verses the order of dismissal on the basis that a judgment of conviction that imposes restitution but does not set an amount of restitution, in violation of Nevada statutes, is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for a writ of habeas corpus, and the post-conviction petition is therefore timely.

Pack v. LaTourette, 128 Nev. Adv. Op. No. 25 (May 31, 2012) – The Court affirms in part and reverses in part a district court order dismissing a third-party complaint, certified as final under NRCP 54(b), in a tort action, ruling that 1) the claim for equitable indemnity fails as a matter of law based on the lack of any preexisting relationship between the third parties and the third-party plaintiffs' active negligence; 2) a party need not pay toward a judgment before bringing a claim for contribution and the third-party contribution claim was not properly dismissed on that ground; 3) when a claim for contribution is contingent upon a successful showing of medical malpractice, a claimant must satisfy the expert affidavit requirement of NRS 41A.071; and 4) the third-party plaintiffs' failure to attach an expert affidavit warranted dismissal of their complaint, but such dismissal should have been without prejudice.

FGA, Inc. v. Giglio, 128 Nev. Adv. Op. No. 26 (June 14, 2012) – The Court reverses a district court judgment in a tort action, ruling that the "mode of operation" approach to premises liability, under which the plaintiff does not have to prove the defendant's knowledge of a particular hazard-

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ous condition if the plaintiff can prove that the nature of the defendant's business tends to create a substantial risk of the type of harm the plaintiff suffered, does not extend beyond the self-service context to "sit-down" restaurants, because the mode of operation approach is premised on the idea that business owners should be held responsible for the risks that their choice to have customers serve themselves creates [citing Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276, 1283 (Mass. 2007)]. The Court concludes that the district court abused its discretion by giving a mode of operation instruction in this case and by excluding certain evidence.

Ryan's Express v. Amador Stage Lines, 128 Nev. Adv. Op. No. 27 (June 14, 2012) – In an appeal involving a motion to disqualify a law firm, the Court defers ruling on the motion pending a limited remand. The case involves as a matter of first impression the issues of whether screening to avoid imputed disqualification of a law firm is appropriate with regard to a settlement judge acting under the Court's settlement conference program, and how to determine the sufficiency of any screening measures utilized. The Court concludes that more facts are necessary to consider the sufficiency of the screening measures in the case, and defers ruling on the motion to disqualify and remands the matter to the district court for the limited purpose of conducting an evidentiary hearing and entering written findings of fact and conclusions of law regarding the adequacy of the screening.

Davis v. Beling, 128 Nev. Adv. Op. No. 28 (June 14, 2012) – The Court affirms in part and reverses in part a district court judgment in a real property contract action, ruling that 1) under NRS 48.105, evidence of compromise offers is not admissible for the purpose of demonstrating a failure to mitigate damages because evidence demonstrating a failure to mitigate necessarily goes to the "amount" of a claim; 2) while NRS 645.251 does not, in all instances, shield real estate licensees from common law forms of liability, it precludes such liability when the type of conduct complained of is covered by NRS 645.252, 645.253, or 645.254; 3) although punitive damages may not be recovered under NRS 645.257, compensatory damages are recoverable under the statute in accordance with the measure of damages that appropriately compensates the injured party for the losses sustained as a result of the real estate licensee's violations; and 4) because the Doughertys successfully defended against the breach of contract claims brought against them under the listing and purchase agreements for the properties at issue, they are entitled to an award of attorney fees under the terms of these agreements.

Choy v. Ameristar Casinos, Inc., 128 Nev. Adv. Op. No. 29 (June 28, 2012) – The Court denies a petition for en banc reconsideration of a panel opinion affirming a district court's order granting summary judgment and denying Choy's NRCP 56(f) request on the basis that Choy failed to substantially comply with NRCP 56(f)'s

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requirement that the party opposing a motion for summary judgment and seeking a denial or continuance of the motion in order to conduct further discovery must provide an affidavit giving the reasons why the party cannot present “facts essential to justify the party’s opposition.” Choy v. Ameristar Casinos, 127 Nev. ___, 265 P.3d 698, 700 (2011). In response to Choy’s contention that the Court’s precedent in Halimi v. Blacketer, 105 Nev. 105, 106, 770 P.2d 531, 531 (1989), did not require parties to comply with NRCP 56(f)’s affidavit requirement, the Court ruled that parties must substantially comply with NRCP 56(f)’s affidavit requirement, and to the extent that Halimi is inconsistent with the text of NRCP 56(f) and Choy, Halimi is disapproved.

Physicians Insurance Co. v. Williams, 128 Nev. Adv. Op. No. 30 (June 28, 2012) – The Court reverses a district court summary judgment for declaratory relief in an insurance action involving the interpretation of a claims-made professional liability insurance policy that appellant Physicians Insurance Company of Wisconsin, Inc., d.b.a. PIC Wisconsin (PIC), issued to non-party dentist Hamid Ahmadi, D.D.S., covering dental malpractice claims made against Dr. Ahmadi and reported to PIC during the policy period. On cross-motions for summary judgment, the district court determined that PIC received constructive notice of respondent Glenn Williams’s malpractice claim against Dr. Ahmadi while the policy was in force and held that this was enough to trigger coverage; the Court reversed, ruling that for a “report” of a potential de-

mand for damages to qualify as a “claim” requires sufficient specificity to alert the insurer’s claim department to the existence of a potential demand for damages arising out of an identifiable incident, involving an identified or identifiable claimant or claimants, with actual or anticipated injuries.

State v. Barren, 128 Nev. Adv. Op. No. 31 (June 28, 2012) – The Court reverses a district court order granting a petition for a writ of mandamus and directing the justice court to dismiss a criminal complaint for lack of jurisdiction, ruling that 1) NRS 62B.330(3)(e)(2) [a statutory provision that divests a juvenile court of jurisdiction over a person who commits a class A or B felony between 16 and 18 years of age but is not identified until after reaching 21 years of age] governs jurisdiction over any proceedings initiated after the provision went into effect on October 1, 2009, regardless of when the offense was committed; 2) respondent Gregory Barren allegedly committed class A and B felonies at 17 years of age but was not identified until after reaching 21 years of age; and 3) because NRS 62B.330(3)(e)(2) was in effect when the State initiated proceedings against Barren, the district court, not the juvenile court, has jurisdiction over his criminal case.

In re George J., 128 Nev. Adv. Op. No. 32 (June 28, 2012) – The Court affirms a district court order transferring a juvenile case for adult criminal proceedings, analyzing the relationship between NRS 62B.330(3)(e)(1) and NRS 62B.335, two statutory provisions that govern the extent of the juvenile court’s jurisdiction when a

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person who has been charged with committing an offense when the person was between 16 and 18 years of age that would be a category A or B felony if committed by an adult. In those circumstances, NRS 62B.330(3)(e)(1) provides that the act is not a “delinquent act” and divests the juvenile court of jurisdiction if the person is identified and charged between the ages of 20 years, 3 months and 21 years. Pursuant to NRS 62B.335, if a person charged with a delinquent act that would have been a category A or B felony if committed by an adult is identified before reaching 21 years of age but is not apprehended until after reaching 21 years of age, then the juvenile court retains jurisdiction to conduct a hearing to determine whether to dismiss the charges or transfer the case to district court for criminal proceedings. The Court rules that 1) NRS 62B.335 only applies to delinquent acts and therefore does not apply to acts that are “deemed not to be a delinquent act” under NRS 62B.330(3); 2) thus, if the case is excluded from the juvenile court’s jurisdiction under NRS 62B.330(3), then the juvenile court does not obtain jurisdiction by virtue of NRS 62B.335; 3) here, the juvenile court lacked jurisdiction under NRS 62B.330(3)(e)(1); and 4) the juvenile court nevertheless reached the correct result by transferring the case to the district court for adult criminal proceedings.

Tri-County Equipment & Leasing v. Klinke, 128 Nev. Adv. Op. No. 33 (June 28, 2012) – The Court reverses a district court judgment entered on a jury verdict in

a tort action involving the issue of whether proof of California workers’ compensation payments can be admitted into evidence in a personal injury action in Nevada, ruling that 1) nothing in NRS 616C.215(10) precludes its applicability to cases in which workers’ compensation payments were made under another state’s similar system; 2) in a trial governed by Nevada law, the workers’ compensation payments made to an injured employee must be admitted as evidence and the proper instruction regarding the jury’s consideration of those payments must be given; 3) the benefits received by both parties in Nevada courts under Nevada law remain the same whether the payments were made under this state’s or another state’s statutes; and 4) pursuant to NRS 616C.215(10), the evidence of the amounts actually paid should have been admitted and the clarifying instruction given.

State, Bus. & Indus. v. Nev. Ass’n Servs., 128 Nev. Adv. Op. No. 34 (August 2, 2012) – The Court affirms a district court order granting a preliminary injunction prohibiting the Nevada Financial Institutions Division (FID) from enforcing its declaratory order and advisory opinion regarding the appropriate amount of homeowners’ association lien fees respondents can collect, ruling that the FID does not have jurisdiction to issue an advisory opinion regarding NRS Chapter 116, since the Nevada Real Estate Division and the Commission for Common Interest Communities and Condominium Hotels have

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exclusive jurisdiction to interpret and administer the provisions of NRS Chapter 116, and that respondents would suffer irreparable harm if the FID enforced its opinion.

Certified Fire Prot. v. Precision Constr., 128 Nev. Adv. Op. No. 35 (August 9, 2012) – On a consolidated appeal from a district court judgment on partial findings and an appeal and cross-appeal from a post-judgment order awarding costs and denying a motion for attorney fees, the Court affirms, ruling that, to recover in quantum meruit, a party must establish legal liability on either an implied-in-fact contract or unjust enrichment basis, and appellant/cross-respondent Certified Fire Protection, Inc. did not provide sufficient evidence to establish either an implied-in-fact contract or unjust enrichment (the Court also affirms on cross-appeal the district court’s order denying attorney fees).

Road & Highway Builders v. N. Nev. Rebar, 128 Nev. Adv. Op. No. 36 (August 9, 2012) – On consolidated appeals from a district court judgment on a jury verdict in a contract action and a post-judgment order denying a new trial motion, the Court affirms in part and reverses in part, ruling that 1) when a fraudulent inducement claim contradicts the express terms of the parties’ integrated contract, it fails as a matter of law; 2) the compensatory damages awarded by the jury under a separate claim for breach of contract are affirmed; and 3) because the fraudulent induce-

ment claim fails as a matter of law, the award for punitive damages cannot stand.

Bonnell v. Lawrence, 128 Nev. Adv. Op. No. 37 (August 9, 2012) – The Court affirms a district court order dismissing a complaint seeking relief from a judgment by independent action pursuant to NRCP 60(b)’s savings clause, ruling that an independent action to obtain relief from an otherwise unreviewable final judgment will lie only when needed to prevent a grave miscarriage of justice, and the allegations and record in this case do not meet that standard.

DeBoer v. Sr. Bridges of Sparks Fam. Hosp., 128 Nev. Adv. Op. No. 38 (August 9, 2012) – The Court reverses a district court order dismissing a tort action, ruling that 1) while a medical facility has a duty to provide competent medical care, when a medical facility performs a nonmedical function, general negligence standards apply, such that the medical facility has a duty to exercise reasonable care to avoid foreseeable harm as a result of its actions; and 2) in this instance, the district court erred when it found that the medical facility owed the patient no duty beyond the duty to provide competent medical care and dismissed the complaint for failure to state a claim.

Liapis v. Dist. Ct., 128 Nev. Adv. Op. No. 39 (August 9, 2012) – The Court grants a writ petition challenging a district court order disqualifying counsel, ruling that an attorney who represents one of his parents in a divorce action between both parents is

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not subject to disqualification 1) on the basis of an appearance of impropriety because appearance of impropriety is not a basis for disqualifying counsel except in the limited circumstance of a public lawyer; nor 2) under the concurrent-conflict-of-interest rule because, absent an ethical breach by the attorney that affects the fairness of the entire litigation or a proven confidential relationship between the non-client parent and the attorney, the non-client parent lacks standing to seek disqualification under RPC 1.7.

Washoe County v. Otto, 128 Nev. Adv. Op. No. 40 (August 9, 2012) – The Court affirms a district court order dismissing a petition for judicial review of a State Board of Equalization tax decision, ruling that 1) under the Nevada Administrative Procedure Act (APA), NRS 233B.130(2)(a) requires that a petitioner name as respondents to a petition for judicial review of an administrative decision “all parties of record”; 2) a party must strictly comply with the APA naming requirement as a prerequisite to invoking the district court’s special statutory jurisdiction to review an administrative decision; 3) when a petitioner fails to name in its petition each party of record to the underlying administrative proceedings, the petition is jurisdictionally defective and must be dismissed; and 4) if the petitioner fails to invoke the district court’s jurisdiction by naming the proper parties within the statutory time limit, the petition may not subsequently be amended to cure the jurisdictional defect.

In re Contested Election of Mallory, 128 Nev. Adv. Op. No. 41 (August 9, 2012) - The Court affirms a district court order denying a petition to set aside the election of the Churchill County District Attorney, ruling that the office of district attorney is not a “state office” subject to term limits under Article 15, Section 3(2) of the Nevada Constitution, since Article 4, Section 32 of the Nevada Constitution declares district attorneys to be “county officers.”

Rolf Jensen & Associates v. Dist. Ct., 128 Nev. Adv. Op. No. 42 (August 9, 2012) – The Court grants a writ petition challenging a district court order denying petitioner’s motion for summary judgment in a tort action, ruling that the Americans with Disabilities Act of 1990 (ADA) pre-empts state law claims for indemnification brought by an admitted violator of the ADA.

Consipio Holding, BV v. Carlberg, 128 Nev. Adv. Op. No. 43 (August 9, 2012) – The Court vacates a district court order, certified as final pursuant to NRCP 54(b), that dismissed a complaint as to several defendants for lack of personal jurisdiction, ruling that 1) Nevada courts can properly exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation; and 2) the district court failed to conduct an adequate factual analysis to determine whether there existed sufficient minimum contacts between the defendant and the forum state such that the district court could properly exercise personal jurisdiction over the respondents before dismissing the complaint against them.

Ninth Circuit Court of Appeals Cases

Metabolic Research v. Ferrell, _ F.3d _, No. 10-16209 (9th Cir. 2012) – The Court held that an order denying a pretrial special motion to dismiss under Nevada’s anti-SLAPP statute, NRS 41.635-670, is not immediately appealable under the collateral order doctrine.

Buckwalter v. Nevada Board of Medical Examiners, _ F.3d _, No. 11-15742 (9th Cir. 2012) – The Court held that members of state medical licensing boards are functionally comparable to judges and thus entitled to absolute immunity for their quasi-judicial acts.

Martin Crowley v. State of Nevada, _ F.3d _, No. 10-17887 (9th Cir. 2012) – Crowley challenged the election recount conducted when he ran for justice of the peace, alleging the defendants had violated the Help America Vote Act of 2002 (“HAVA”) (42 U.S.C. §§ 15301-15545). The Court affirmed the district court’s dismissal of Crowley’s claims, holding that, because HAVA was not intended to benefit voters and candidates in local elections with respect to recounts, such individuals do not have a private right of action under 42 U.S.C. § 1983.

Schneider v. McDaniel, _ F.3d _, No. 09-16945 (9th Cir. 2012) –The 9th Circuit affirms the denial of a petition for a writ of habeas corpus in the United States District Court for the District of Nevada, , ruling that petition has not made a substantial showing that he was entitled to an evidentiary hearing (noting that the

petitioner does not even identify any evidence that he argues the district court should have considered), and declining to expand the certificate of appealability.

RANDY MUNN RECIPIENT OF 2012 JAMES M. BARTLEY DISTINGUISHED PUBLIC LAWYER AWARD

Randal R. (Randy) Munn received the 2012 James M. Bartley Distinguished Public Lawyer Award from the Public Lawyers Section.

Randy began his public service career in 1993 at the Nevada Attorney General’s Office, where he served under four different Attorneys General and rose to Assistant Attorney General. Randy served as Reno Deputy City Attorney from 2008-10, and since has served as Chief of the Civil Division at the Carson City District Attorney’s Office.

Throughout the course of his career, Randy has mentored numerous attorneys, has lead by example, and has maintained the highest professional standards as a public lawyer.

United States Supreme Court Cases

United States v. Alvarez, 567 U.S. __, No. 11-210 (June 25, 2012) – The Court ruled as unconstitutional the Stolen Valor Act of 2005, 18 U.S.C. §§704(b),(c) [making it a crime to falsely claim receipt of military decorations]. A four-justice plurality applied an “exacting scrutiny” in holding that the Act infringes on content-based speech protected by the First Amendment. Two other justices concurring in the judgment stated they would apply intermediate scrutiny and hold that because the Stolen Valor Act would result in disproportionate harm, it fails intermediate scrutiny because the government can achieve its objective of protecting the integrity of military honors in less burdensome ways.

National Federation of Independent Business v. Sebelius, et al., 567 U.S. __, Nos. 11–393, 11–398 and 11–400 (June 28, 2012) – In a 5-4 opinion the Court upheld the Affordable Care Act (ACA) with one notable exception, concluding that the ACA mandate requiring individuals to purchase health insurance cannot be upheld under either Congress’s power to regulate commerce or the Necessary and Proper clause, but can be upheld under Congress’s taxing authority because it can be reasonably understood as imposing a tax on those who do not have insurance. Regarding Medicaid expansion, a seven-member majority struck the provision as an unconstitutional use of the Spending Power for the Federal Government to penalize states that choose not to participate in the ACA’s Medicaid expansion program by taking away all their existing Medicaid

funding, as this runs counter to federalism and is “economic dragooning” leaving states with no option but to acquiesce to the expansion.

Miller v. Alabama, 567 U.S. __, No. 10–9646 (June 25, 2012) – In a 5-4 opinion the Court held that the Eighth Amendment prohibits a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders, opining that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles” and expanding on its precedent in Roper v. Simmons, 543 U. S. 551 (2005), in which the Court held that the Eighth Amendment bars capital punishment for juvenile offenders, and Graham v. Florida, 560 U. S. __ (2010), in which the Court ruled that the Eighth Amendment prohibits life without parole for juveniles who committed nonhomicide offenses.

Arizona v. United States, 567 U.S. __, No. 11–182 (June 25, 2012) – The Court struck down 3 out of 4 parts of Arizona’s illegal immigration law on the basis of federal preemption: section 3 (making failure to comply with federal alien-registration requirements a state misdemeanor); section 5(C) (making it a misdemeanor for an unauthorized alien to seek or engage in work in AZ); and section 6 (authorizing state and local officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States”). The Court ruled that section 2(B) of the law

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(requiring officers conducting a stop, detention, or arrest to attempt to verify the person's immigration status with the Federal Government) is not on its face preempted by federal law.

Southern Union Company v. United States, 567 U.S. ___, No. 11-94 (June 21, 2012) – In a 6-3 opinion the Court held that the rule announced in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires a jury to find beyond a reasonable doubt, any fact (other than a prior conviction) that increases a criminal defendant's maximum potential sentence, also applies to sentences of criminal fines.

Knox v. Service Employees Int'l Union, 567 U.S. ___, No. 10-1121 (June 21, 2012) – In a 7-2 opinion the Court held that 1) public sector unions may not require nonmembers to pay for special assessments that will be used to fund a political or ideological activity; 2) fresh notice must be given to nonmembers when assessing a special fee; and 3) unions may not exact funds unless the nonmembers provide affirmative consent. Although the union in this case offered a full refund of the paid assessments after certiorari was granted, the Court held that the issue was not moot because the conduct could be immediately resumed.

Williams v. Illinois, 567 U.S. ___, No. 10-8505 (June 18, 2012). By a 4-1-4 vote, the Court held that a defendant's Confrontation Clause rights were not violated in his prosecution for sexual assault when an expert witness, relying on DNA testing

performed and a lab report prepared by another DNA analyst, gave her expert opinion that there was a DNA match. The testimony was based upon rape kit evidence that was sent to Cellmark, an independent lab under contract with the State, which performed a DNA analysis, resulting in a profile that was duly entered into the State's DNA data bank. The computer system indicated a possible match to a profile developed from a sample provided by the defendant, who had been required to submit to DNA testing as a result of his arrest for an unrelated crime. The victim subsequently identified defendant in a line-up as her attacker.

At defendant's non-jury trial, the State called the technician from the State lab that had developed defendant's DNA profile, as well as the DNA analyst who had compared those results with the profile prepared by Cellmark from the DNA collected from the vaginal swabs taken from the victim. That analyst testified that Cellmark was an accredited lab whose results she and other experts routinely relied upon. She also testified to the chain of custody procedures followed for submitting evidence to, or receiving evidence or reports from, Cellmark. The analyst testified that the comparison between the Cellmark profile based upon the samples submitted from the victim and the profile of defendant's DNA sample was, essentially, a match. Defendant argued that the testimony identifying the Cellmark profile as having come from the swabs taken from the victim violated his Sixth Amendment right to confrontation.

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Although the Court affirmed the defendant's convictions for sexual assault and related crimes, only four justices joined the plurality opinion, with the fifth vote resting on an entirely different rationale. The plurality opinion offered two alternative grounds for admitting the analyst's testimony concerning the Cellmark report. First, the plurality concluded that the statement concerning the provenance of the Cellmark profile was not offered for the truth of the matter, placing it outside the reach of Crawford v. Washington, 541 U.S. 36 (2004), and its progeny. The second rationale offered by the plurality for admitting the testimony was that the Cellmark report was not "testimonial" under *Crawford* because no suspect had yet been identified and there was thus no possibility that the results of any testimony might accidentally or deliberately be skewed so as to identify a particular suspect. An opinion by Justice Thomas concurring in the judgment rejected that reasoning but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." The dissenting justices saw no distinction between this case and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), or Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). The absence of a majority opinion, along with the vigorous dissent joined by the remaining justices, raises more questions about when and how an expert may testify to conclusions based upon the opinions or work of other experts or technicians.

Parker v. Matthews, 566 U.S. ___, No. 11-845 (June 11, 2012) - Through a unanimous *per curiam* opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief to respondent. Stating that the Sixth Circuit's decision "is a textbook example of what [AEDPA] proscribes," the Court held that the Sixth Circuit erred when it granted habeas relief on the grounds that the Kentucky Supreme Court improperly shifted to respondent the burden of proving extreme emotional disturbance, and improperly held that 1) the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt; and 2) certain remarks in the prosecutor's closing argument constituted a denial of due process.

Reichle v. Howards, 566 U.S. ___, No. 11-262 (June 4, 2012) - The Court unanimously held that two federal law enforcement agents were entitled to qualified immunity from a §1983 action alleging they arrested respondent in retaliation for his political speech, where the agents had probable cause to arrest respondent for committing a crime. In Hartman v. Moore, 547 U.S. 250 (2006), the Court held that probable cause to arrest defeats a First Amendment claim of retaliatory prosecution. In this case, the Court declined to decide whether a similar rule applies to a First Amendment claim of retaliatory arrest; rather, the Court held that Hartman left the law sufficiently uncertain that it was not clearly established that an arrest supported by probable cause could still violate the First Amendment. (Petitioners are Secret Service

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Agents who arrested respondent after he confronted then-Vice-President Dick Cheney in public and expressed his disapproval of the Bush Administration's Iraq war policy.)

Armour v. City of Indianapolis, Indiana, 566 U.S. __, No. 11-161 (June 4, 2012)

- The Court rules in case involving the constitutionality of municipal assessments on a sewer improvement project in which the City of Indianapolis originally imposed a \$9000 assessment on 31 real estate parcels to pay the cost of a sewer improvement project. The city later enacted a law that changed its assessment method for such projects and forgave the outstanding balance of those lot owners who were paying in monthly installments over 10, 20, or 30 years, but refused to refund payments made by those who had already paid in full. By a 6-3 vote, the Court held that the city's "forgiveness but no refund" policy did not violate the Equal Protection Clause. The Court held that city had a rational basis for treating differently those who had already paid and those who had not, namely, sparing itself the "complex and expensive" administrative cost of adopting a different approach.

Coleman v. Johnson, 566 U.S. __, No. 11-1053 (May 29, 2012) - Through a unanimous *per curiam* opinion, the Court summarily reversed a Third Circuit decision that had granted habeas relief on the ground that the evidence at trial was insufficient to support the conviction under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court stated that the Third Circuit failed to afford "due re-

spect to the role of the jury," as required by *Jackson*, and failed to afford due respect to the state courts, as required by AEDPA.

Blueford v. Arkansas, 566 U.S. __, No. 10-1320. (May 23, 2012) - At petitioner's murder trial, the jury was instructed on the greater offense of capital murder and three lesser-included offenses, and was told it could convict on one of them or acquit on all of them. A few hours after it starting deliberating, the jury forewoman reported that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. After further deliberations, the jury reported that it could not reach a verdict, and the court declared a mistrial. By a 6-3 vote, the Court held that the Double Jeopardy Clause does not bar Arkansas from retrying Blueford on the charges of capital murder and first-degree murder. The Court concluded that the jury's report was not a final resolution that acquitted Blueford of those two charges; and that the trial court did not abuse its discretion by declaring a mistrial without ordering the jury to vote (contrary to Arkansas law) on whether to acquit on those two charges.

Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. __, No. 10-1472 (May 21, 2012) - Under 28 U.S.C. §1920(6), one of the categories of costs that may be awarded to the prevailing party in a federal lawsuit is "compensation of interpreters." By a 6-3 vote, the Court held that the cost of translating *written* documents

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is not “compensation of interpreters” for purposes of that provision. The Court reasoned that “the ordinary meaning of the word ‘interpreter’ is a person who translates language orally from one language to another.”

Wood v. Milyard, 566 U. S. ___, No. 10-9995 (April 24, 2012) - In case involving a habeas petition following a murder conviction, the Court (by a 7-2 vote) held that a federal court of appeals has the authority to raise *sua sponte* an AEDPA statute of limitations defense. The Court further held, however, that the Tenth Circuit abused its discretion when it did so in this case because the state - by telling the district court that it would not challenge, but was not conceding, the timeliness of the habeas petition - deliberately waived the statute of limitations defense.

Filarsky v. Delia, 566 U. S. ___, No. 10-1018 (April 17, 2012)- The Court unanimously held that a private individual (in this instance an attorney) retained by the government on a temporary basis is entitled to the same immunity from a §1983 action as a full-time government employee, noting that when Congress enacted §1983 in 1871, the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.

Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U. S. ___, No. 10-945 (April 2, 2012) - In a 5-4 ruling, the Court affirmed the Third Circuit’s re-

jection of petitioner’s claim under 42 U.S.C. §1983 that his Fourth and Fourteenth Amendment rights were violated, ruling that courts, absent substantial evidence to the contrary, must defer to the judgment of correction officials in implementing a policy of strip searching every detainee placed in the general jail population, regardless of the minor nature of the offense for which he or she was arrested. The Court found the policy under review reasonable to protect the safety of all concerned, including the detainee.

Rehberg v. Paulk, 566 U. S. ___, No. 10-788 (April 2, 2012) - In a unanimous opinion, the Court held that a law-enforcement witness who testifies in a grand jury proceeding is entitled to the same absolute immunity from suit under 42 U.S.C. §1983 as a witness who testifies at trial.

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