



Summaries of Published Opinions: The Nevada Supreme Court and Nevada Court of Appeals

The following summaries include, in bold, a case citation along with the primary areas of practice and/or subject matter addressed in the decisions. In addition, each summary identifies significant new rules of law or issues of first impression decided by Nevada's appellate courts.

These summaries are prepared by the state bar's Appellate Litigation Section as an informational service only and should not be relied upon as an official record of action. While not all aspects of a decision can be included in these brief summaries, we hope that readers will find this information useful, and we encourage you to review full copies of the Advance Opinions, which are located on the Nevada Supreme Court's website at: https://nvcourts.gov/Supreme/Decisions/Advance_Opinions/.

***Aguilar v. Lucky Cab Co.*, 140 Nev., Adv. Op. No. 1 (January 4, 2024) – Offers of judgment; prevailing parties.**

An offer of judgment that *excludes* costs, expenses, interest, and attorney fees promises to pay the principal and a *separate* amount for recoverable costs, expenses, interest, and attorney fees if accepted by treating the offeree as a prevailing party. An offeror cannot obtain dismissal unless the offeror pays both the offer amount and any additional allowances.

***Dickey v. State*, 140 Nev., Adv. Op. 2 (January 4, 2024) – Other acts, expert testimony.**

When requesting admission of other act evidence under *Petrocelli* and NRS 48.045(2), parties have an obligation to clearly identify the exception to the general principle of inadmissible character evidence under which they are seeking admission. The court must determine whether any of those bases apply and must be careful not to conflate the analysis for admission of other act evidence under *Petrocelli* with the more stringent analysis required for the admission of evidence regarding other sexual offenses for propensity purposes. Additionally, when a party has challenged the qualifications of an expert, the court must engage in a thorough analysis of the *Hallmark* factors either in writing or on the record.

***Abbott v. City of Henderson*, 140 Nev., Adv. Op. 3 (January 25, 2024) (En Banc) – Governmental immunity.**

The amendments to NRS 41.510's protections apply to "any premises," superseding the court's decision in *Boland v. Nevada Rock & Sand Co.*, 111 Nev. 608, 894 P.2d 988 (1995). Here, the plaintiff was engaged in a "recreational activity" as defined by NRS 41.510 when she was injured, as walking and assisting a child on a playground is similar to the nonexhaustive activities listed in the statute.

***Sullivan v. Lincoln County Water District*, 140 Nev., Adv. Op. No. 4 (January 25, 2024) (En Banc) – Water law; civil procedure.**

The State Engineer has the authority to delineate multiple hydrographic basins into a single basin and to conjunctively manage surface waters and groundwater and to jointly administer the same. The State Engineer did not violate due process protections because Respondents received notice and had an opportunity to be heard.

***Chittenden v. Justice Court of Pahrump Twshp.*, 140 Nev., Adv. Op. 5 (Ct. App. Jan. 25, 2024) – Preliminary hearing delays; good cause.**

When scheduling a preliminary hearing outside the statutory time frame, justice courts must balance the defendant's constitutional rights against the interests of the State and the needs of the court. Justice courts must also make findings as to why a delay is justified and must undertake efforts to ensure that the preliminary hearing is held as soon as possible thereafter. In this case, the justice court's justifications for the delay were premised on mistakes of law and fact and were plainly inadequate to justify the delay.

***Wynn v. the Associated Press*, 140 Nev., Adv. Op. 6 (Feb. 8, 2024) – Anti-SLAPP motions to dismiss.**

To demonstrate by prima facie evidence a probability of success on the merits of a public figure defamation claim under the second prong of Nevada's anti-SLAPP framework, the plaintiff's evidence must be sufficient for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice.

***Willson v. First Jud. Dist. Ct.*, 140 Nev., Adv. Op. 7 (Ct. App. Feb. 8, 2024) Criminal law; vagueness.**

The final clause of NRS 197.190 only applies to physical conduct or fighting words which are specifically intended to hinder, delay, or obstruct a public officer in the

discharge of their official duties. As such, it is not unconstitutionally vague or overbroad, either on its face or as applied to petitioner.

***Falconi v. Eighth Judicial District Court*, 140 Nev., Adv. Op. 8 (Feb. 15, 2024) (En Banc) – Family law; courtroom closures.** EDCR 5.207, EDCR 5.212, and NRS 125.080 violate the public's constitutional right to access courtroom proceedings to the extent they permit a district court to automatically close family court proceedings to the public upon request by a party without first analyzing the factors that should be considered as to whether courtroom closure comports with the competing constitutional and privacy interests at play in family law cases.

***Itgiben, M.D., v. Eighth Jud. Dist. Ct.*, 140 Nev., Adv. Op. 9 (Ct. App. Feb. 22, 2024) – Statute of limitations; inquiry notice; medical malpractice.**

A plaintiff is placed on inquiry notice sufficient to trigger accrual of a cause of action for professional negligence or wrongful death once the plaintiff or her representative has received all necessary medical records documenting the relevant treatment and care at issue.

***Chadwick v. State*, 140 Nev., Adv. Op. 10 (Ct. App., Feb. 29, 2024) – Criminal law, evidence.**

The trial court did not abuse its discretion when it admitted other bad acts evidence of the defendant's alcohol consumption and apparent intoxication during his trial for leaving the scene of an accident involving personal injury. Evidence of defendant's apparent intoxication met the three factors outlined in *Tinch v. State*, 113 Nev. 1170 (1997) because (1) it established motive to flee; (2) it was supported by clear and convincing evidence; and (3) it was not substantially outweighed by the danger of unfair prejudice. Additionally, the court did not abuse its discretion when it admitted evidence of the defendant's threats and gang affiliation without a hearing or limiting

instruction. A defendant bears the burden of requesting a limiting instruction when they directly elicit bad act evidence, as the defendant did in this case.

Lamont's Wild W. Buffalo, LLC v. Terry, 140 Nev., Adv. Op. 11 (March 7, 2024) – Sanctions. NRCPC 11(c)(2)'s requirements that a party seeking sanctions must file a motion for sanctions "separate from any other motion" and that the motion must be served 21 days prior to filing do not apply to the independent sanctioning mechanisms provided for by NRS 7.085 or NRS 18.010(2)(b).

Sunrise Hospital and Medical Center, LLC v. Eighth Judicial District Court, 140 Nev., Adv. Op. No. 12 (March 7, 2024) – Medical Malpractice; privilege. Under the Patient Safety and Quality Improvement Act of 2005 (PSQIA), *identifiable* patient safety work product is privileged from discovery in civil proceedings and the privilege is not subject to waiver. Further, PSQIA's implementing regulations additionally contemplate when voluntary disclosure could defeat privilege, specifically for *nonidentifiable* patient safety work product.

Gibbs v. State, 140 Nev., Adv. Op. 13 (March 7, 2024) – Attorney-client privilege. A telephone conversation between an in-custody defendant and a defense investigator was covered by the attorney-client privilege, even though the defendant routed the call through three-way calling, because there was no evidence that the third party remained present for the conversation or that the defendant intended to waive privilege. Further, the defendant's violation of jail policy when he used another detainee's access code did not act as a waiver of the attorney-client privilege.

Valley Health System v. Murray, 140 Nev. Adv. Op. 14 (March 14, 2024) (En Banc) – Medical malpractice. Hospitals do not owe a fiduciary duty to their patients in connection with medical treatment. Therefore, the award of punitive damages based on breach of fiduciary duty was reversed. The award based on professional negligence was remanded because the award for noneconomic damages should have been reduced to an aggregate \$350,000, based on the statutory cap in NRS 41A.035. The entire award against the hospital should have also been reduced to its 61 percent pro rata share under several liability.

Clark County v. 6635 W Oquendo, LLC, 140 Nev. Adv. Op. No. 15 (March 14, 2024) (En Banc) – Government and administration; real property. NRS 0.039 states "[e]xcept as otherwise expressly provided in a particular statute or required by the context," "[person] does not

include a government, governmental agency, or political subdivision of a government," and thus, plainly precludes a government entity from being a *natural person* for purposes of bringing an anti-SLAPP action.

Ge v. State, 140 Nev., Adv. Op. 16 (March 21, 2024) – Criminal law; restitution. An order of restitution for the victims of a crime must be supported by competent evidence and any restitution award must be offset by the amount recovered by the defendants' insurance.

Draskovich v. Draskovich, 140 Nev., Adv. Op. 17 (March 21, 2024) – Divorce; separate property. A business established prior to marriage remains a party's separate property if it is shown to be a continuation of the prior business, even if reincorporated under a new name during marriage. While the change in corporate name during the marriage does not itself trigger the community property presumption of NRS 123.220, the opposing party must be given the opportunity to show a community property portion by clear and convincing evidence, and the court must consider the totality of circumstances surrounding the premarital enterprise.

In re I.S., 140 Nev., Adv. Op. 18 (March 28, 2024) – Juvenile delinquency; separation of powers. The requirement for prosecutorial consent under NRS 62C.200(1)(b) before a juvenile court dismisses a petition under NRS 62C.230(1)(a) does not constitute an unconstitutional prosecutorial limitation on the court's ability to dismiss a petition without prejudice and refer a juvenile to informal supervision. This decision is not an exercise of the juvenile court's sentencing discretion that would create a separation of powers issue. The juvenile court, unlike the district court in adult criminal cases, is limited to the authority granted in statute.

Smith v. State, 140 Nev., Adv. Op. 19 (Mar. 28, 2024) – Fourth Amendment; search warrants. Although an affidavit may be incorporated into a search warrant to establish probable cause, that affidavit may not expand the scope of the search and seizure permitted under the specific language of the warrant. In this case, the danger of imminent evidence destruction justified the warrantless seizure of appellant's cell phone, even where the warrant did not authorize the search of his person. But because no separate exigency justified the subsequent forensic search of the cell phone, and officers failed to obtain a new warrant for that analysis, the district court erred when it denied appellant's

motion to suppress the evidence obtained from that improper search.

Kabew v. State, 140 Nev., Adv. Op. 20 (March 28, 2024) – Judicial discretion; drug court. NRS 176A.240(6)(a) removes judicial discretion and requires the district court to set aside a judgment of conviction when a defendant fulfills the terms and conditions of probation pursuant to a substance abuse treatment program unless the defendant has a prior felony conviction or previously failed a specialty court program.

Judd v. State, 140 Nev., Adv. Op. 21 (Ct. App., Mar. 28, 2024) – Criminal law. The "physical force" required for criminal coercion to be punishable as a felony under NRS 207.190(2) is force against a person, and not property.

Posner v. U.S. Bank Nat'l Assoc., 140 Nev., Adv. Op. 22 (April 4, 2024) – Foreclosures; default. Recording a notice of default to institute judicial foreclosure proceedings does not trigger the 10-year time period in NRS 106.240, which would otherwise discharge a debt 10 years from the date the debt became "wholly due," where judicial foreclosure is not listed as an action rendering the mortgage "wholly due" in the deed of trust.

Ortiz v. State, 140 Nev., Adv. Op. 23 (April 4, 2024) – Ineffective assistance of counsel; sexual assault. Nevada law establishes that separate convictions for sexual assault will not stand when there was one continuous course of sexual assault. Appellate counsel was ineffective because although she argued that the trial court should have instructed the jury on this principle, she did not raise a sufficiency-of-the-evidence claim regarding the separate sexual assault convictions.

Morrison v. State, 140 Nev., Adv. Op. 24 (Ct. App., Apr. 4, 2024) – Jury instructions; harmless error. In NRS 200.710(1), the word "knowingly" applies to each element of the crime of use of a minor in the production of pornography. Therefore, to obtain a conviction, the plain statutory language requires the State to prove that the defendant knew or had reason to know that the victim was a minor at the time of the crime. Thus, the district court erred when it instructed the jury that the State did not need to prove that the appellant knew or had reason to know the victim was a minor under the age of 18 at the time of the offense. However, because the appellant stated in a recorded interview that was admitted into evidence that he believed the victim was 16 years old, the error was harmless beyond a reasonable doubt.