The Public Lawyer

STATE BAR OF NEVADA

Public Lawyers Section

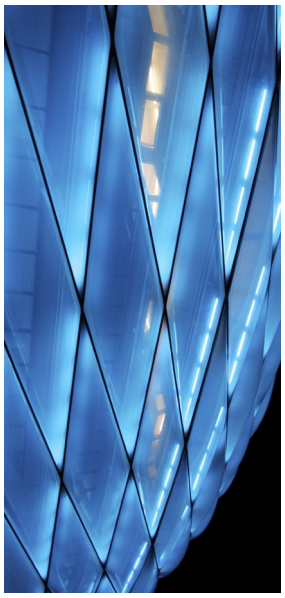
Winter 2013-14

Brett Kandt, Chair

Nevada Supreme Court Cases

Moon v. McDonald, Carano & Wilson, L.L.P., 129 Nev. Adv. Op. No. 56 (August 1, 2013) – The Court affirms a district court judgment dismissing appellants' complaint in a legal malpractice action, ruling that 1) under NRS 11.207(1), the statute of limitations for a legal malpractice claim commences on the date the plaintiff discovers, or through due diligence should have discovered, the material facts that constitute the cause of action; 2) the statutory limitation period for a claim of legal malpractice involving the representation of a client during litigation does not commence until the underlying litigation is concluded [citing Hewitt v. Allen, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002)]; and 3) an attorney's alleged negligence in representing a creditor in the non-adversarial parts of a bankruptcy proceeding does not constitute litigation malpractice causing the so-called Hewitt litigation tolling rule to apply.

Khan v. Bakhsh, 129 Nev. Adv. Op. No. 57 (August 1, 2013) – The Court reverses a district court judgment after a bench trial in a contract and tort action and remands with instructions. At trial, the district court excluded under the statute of frauds certain evidence the Khans presented of an allegedly written, but lost or destroyed, agreement to purchase a certain restaurant and land from Bakhsh. The Court rules that 1) the district court erred in that the statute of frauds does not apply to a writing that is subsequently lost or destroyed, and oral evidence is admissible to prove the existence and terms of that lost or destroyed writing; 2) the district court further erred when it improperly excluded evidence concerning whether a prior agreement was induced by fraud or modified by a subsequent agreement because the parol evidence rule



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does not preclude such evidence; and 3) because actual damages were ascertainable and the liquidated damages provision operated as a penalty, the district court erred by awarding liquidated damages.

State v. Greene, 129 Nev. Adv. Op. No. 58 (August 1, 2013) – The Court reverses a district court order granting respondent's untimely and successive fifth post-conviction petition for a writ of habeas corpus after a hearing at which the district court determined that respondent Greene received ineffective assistance of counsel at his resentencing hearing and directed Greene's counsel to draft the order granting the petition but refused to provide an explanation for its decision. The Court reiterates that when the district court directs a prevailing party to draft an order resolving a post-conviction petition for a writ of habeas corpus, it must provide sufficient direction regarding the basis for its decision to enable the prevailing party to draft the order; and rules that the district court erroneously determined that Greene established good cause sufficient to excuse the procedural bars to a consideration of his petition on the merits.

Holmes v. State, 129 Nev. Adv. Op. No. 59 (August 22, 2013) – The Court affirms a jury conviction of first-degree murder and robbery, both with the use of a deadly weapon, ruling that 1) Holmes was not deprived of a fair trial by the admission into evidence of inflammatory rap lyrics he wrote while in jail in California that describe details that mirrored the crimes charged, since the district court did not abuse its discretion in determining that the risk they carried of unfair prejudice did not substantially outweigh their probative value; 2) Holmes was not deprived of a fair trial by the admission into evidence of a coconspirator's out-of-court statement that Holmes "went off' and "just started shooting" since an abuse of discretion amounting to plain error does not appear in the record; and 3) Holmes was not deprived of a fair trial by the admission into evidence of unwarned statements that Holmes made to the Nevada detectives who interviewed him in California before his arrest, since the interrogation was not custodial and the district correctly found that the statement was voluntary.

Bradford v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 60 (August 29, 2013) – The Court denies a writ petition challenging a district court order dismissing a divorce complaint, ruling that petitioner Geanie Bradford's failure to timely appeal the order precludes writ relief, since the validity of the parties' marriage was an issue capable of review on appeal and an appeal would have been an adequate legal remedy.

State of Nevada v. Tatalovich, 129 Nev. Adv. Op. No. 61 (September 19, 2013) – The Court affirms a district court order granting a petition for judicial review of a Private Investigator's Licensing Board decision, ruling that investigative work undertaken for the purpose of developing and giving expert opinion testimony in a Nevada civil court case does not require a Nevada private investigator's license.

Loeb v. First Jud. Dist. Ct., 129 Nev. Adv. Op. No. 62 (September 19, 2013) –

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The Court denies a writ petition challenging a district court order denying a motion to serve individual defendants by publication. The Court rules that a party residing outside of the United States whose foreign address is known may not be served by publication pursuant to NRCP 4(e)(1)(i) and (iii), but must be served under the terms of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in one of the following manners: 1) "through the central authority of the receiving country," 2) "through diplomatic or consular agents that the receiving country considers nonobjectionable." or 3) "by any method permitted by the internal law of the receiving country" [citing Dahya v. Second Judicial Dist. Court, 117 Nev. 208, 212, 19 P.3d 239, 242 (2001)].

Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 63 (September 19, 2013) – The Court denies a writ petition challenging a district court order compelling disclosure of insurance policies. The Court rules that NRCP 16.1(a)(1)(D), which requires disclosure of any insurance agreement that may be liable to pay a portion of a judgment, compels disclosure of all insurance agreements, regardless of whether the policy limits exceed the amount of potential liability or whether the policies provide secondary coverage.

Adept Mgmt. v. McKnight Family, L.L.P., 129 Nev. Adv. Op. No. 64 (October 3, 2013) – On consolidated appeals from a district court order dismissing a complaint pursuant to NRS 38.310 and from a post-judgment order denying a motion for attorney fees and costs in a case regarding a dispute over unpaid HOA property assessments, the Court affirms in part, reverses in part and remands, ruling that while the district court was correct in determining that most of McKnight's claims were subject to NRS 38.310 and should have been submitted to a form of alternative dispute resolution before being brought in district court, the district court erred to the extent that it dismissed McKnight's claim for quiet title because that claim was not subject to NRS 38.310. The Court reverses the dismissal of McKnight's quiet title claim and the district court's order denying the motion to set aside the trustee's sale.

Nev. Pub. Emps. Ret. Bd. v. Smith, 129 Nev. Adv. Op. No. 65 (October 3, 2013) – The Court reverses a district court order granting declaratory and other relief as to certain statutes governing the Public Employees' Retirement System in a case involving interpretation of retirement eligibility under NRS 286.541(2). The Court rules that the district court erred in its interpretation of the controlling statute and in reviewing the PERS Board's decision de novo, rather than deferentially. Under PERS interpretation of the statute, a member who goes from one PERS-eligible job to another without a break in service and retiring from PERS may not thereafter retire and receive benefits from PERS, until the member effectively retires from his or her new PERS-eligible job. The district court had disagreed and ruled that 1) NRS 286.541(2) determines retirement benefit dates, not retirement eligibility; 2) PERS should have allowed respondent Douglas Smith to retire and receive benefits from

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PERS based on his prior public service, even after he was sworn in as a district court judge, another PERS-eligible position; and 3) under NRS 286.190(3)(a), PERS could and should have equitably excused Judge Smith's noncompliance with NRS 286.541, and allowed him to reverse his eventual election to transfer from PERS to the Judicial Retirement System (JRS), despite NRS 1A.280(6), which makes such an election irrevocable.

In re Discipline of Serota, 129 Nev. Adv. Op. No. 66 (October 3, 2013) – In a review of a Southern Nevada Disciplinary Board hearing panel's recommendation that an attorney be disbarred from the practice of law and related petitions, the Court rules that clear and convincing evidence supported the panel's findings that Serota failed to safekeep his client's property, a violation of RPC 1.15, that he engaged in misconduct, a violation of RPC 8.4, and that the egregiousness of misappropriating $319,000 in client funds warrants disbarment.

Newmar Corp. v. McCrary, 129 Nev. Adv. Op. No. 67 (October 3, 2013) – On consolidated appeals from a district court judgment in a revocation of acceptance and breach of warranty action and from a postjudgment order awarding attorney fees, the Court affirms in part and reverses in part, ruling that the purchaser of a motor home may revoke acceptance and recover the purchase price from the motor home's manufacturer under the Uniform Commercial Code where, as here, privity exists between the manufacturer and the buyer because the manufacturer interjected itself into the sales process and had direct dealings with the buyer to ensure the completion of the transaction, but that ,while the district court properly awarded incidental and consequential damages, it abused its discretion in awarding attorney fees and that portion of the judgment is reversed.

St. Mary v. Damon, 129 Nev. Adv. Op. No. 68 (October 3, 2013) – The Court reverses a district court order determining custody of a minor child in a same sex relationship, ruling that 1) the district court erred in relying on a previous order that recognized Damon as the child's legal mother and granted her the right to be added as a mother to the child's birth certificate to conclude that St. Mary was a mere surrogate, and abused its discretion in refusing to uphold the parties' co-parenting agreement or consider whether St. Mary was a parent entitled to any custodial rights; 2) the Nevada Parentage Act does not preclude St. Mary and Damon from both being legal mothers of the child; and 3) the district court erred in deeming the co-parenting agreement unenforceable under NRS 126.045, since the agreement's plain language indicated that it was not a surrogacy arrangement within the scope of that statute, and the agreement aligns with Nevada's policy of encouraging parents to enter into parenting agreements that resolve matters pertaining to their child's best interest.

Markowitz v. Saxon Special Servicing, 129 Nev. Adv. Op. No. 69 (October 3, 2013) – The Court affirms a district court order denying a petition for judicial review in a Foreclosure Mediation Program mat-

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ter. The Court rules that, because the mediation rule requiring an appraisal or broker's price opinion that is no more than 60 days old at the time of the mediation is based on the principle that a current appraisal or broker's price opinion is intended to facilitate good-faith mediation negotiations, the rule's content-based provision governing the appraisal's age is directory rather than mandatory, and thus, substantial compliance with the 60-day provision satisfies the mediation rule.

In re CityCenter Constr. & Lien Litig., 129 Nev. Adv. Op. No. 70 (October 3, 2013) – The Court grants a writ petition challenging a district court order denying petitioner's motion to dismiss real parties in interest's third- and fourth-party complaints in a construction defect action. The Court rules that 1) Century's and PCS's initial causes of action brought actions that were within the scope of NRS 11.2565(1)'s definition of an action involving nonresidential construction; 2) because their pleadings identified Converse's professional engineering services [NRS 625.050(1)(a)], their pleadings were against a design professional [NRS 11.2565(2)(b)], thereby subjecting them to NRS 11.258's attorney affidavit and expert report requirements; 3) Otak Nevada, L.L.C. v. Eighth Judicial District Court [127 Nev. , 260 P.3d 408 (2011)] correctly construed NRS 11.259(1) as requiring the dismissal of an amended pleading—not an entire action—that followed an initial pleading that was filed without adhering to NRS 11.258; and 4) the district court must dismiss the amended pleadings against Converse as they were void ab initio for their failure to comply with NRS 11.258.

Wells Fargo Bank, N.A. v. O'Brien, 129 Nev. Adv. Op. No. 71 (October 3, 2013) – The Court dismisses an appeal from a district court order granting a petition for judicial review of a foreclosure mediation, awarding sanctions, and remanding the matter to the Foreclosure Mediation Program for further mediation. The Court rules that an order remanding for further mediation generally is not final and therefore not appealable [NRAP 3A(b)(1)].

N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 129 Nev. Adv. Op. No. 72 (October 3, 2013) – The Court affirms a district court order denying a writ petition seeking payment under NRS Chapter 474 in a matter arising from the Washoe County Commissioners' decision to withhold collected property taxes from the North Lake Tahoe Fire Protection District. The Court adopts the factors set forth in Baker v. Carr [369 U.S. 186, 217 (1962)] and concluding that because respondents were within their authority to withhold distributions, and because the manner in which they did so was discretionary, the political question doctrine precludes judicial review.

In re Steven Daniel P., 129 Nev. Adv. Op. No. 73 (October 3, 2013) – The Court reverses a district court juvenile division order dismissing a delinquency petition and referring the juvenile for informal supervision and remands for further action. The Court rules that 1) NRS 62C.230(1)(a) grants the juvenile court authority to dismiss a petition and refer a juvenile for in-

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formal supervision only when the requirements of NRS 62C.200 have been met, including the requirement that the district attorney give written approval for placement of the juvenile under informal supervision where the acts alleged in the petition would be a felony or gross misdemeanor if committed by an adult; and 2) the juvenile court is limited by the provisions of NRS Title 5 when exercising its authority to carry out its duties in overseeing juvenile justice matters.

Paley v. Second Jud. Dist. Ct., 129 Nev. Adv. Op. No. 74 (October 3, 2013) – The Court denies a writ petition challenging a juvenile court order holding petitioner in direct contempt of court based on a positive drug test; the respondent district court judge vacated the contempt order while the writ petition was pending. The Court rules that an exception to the mootness doctrine allowing judicial review when the contested issue is likely to arise again but will evade review does not apply because it is clear that a positive drug test alone will not support a finding of direct contempt under NRS 22.010.

Trujillo v. State, 129 Nev. Adv. Op. No. 75 (October 10, 2013) – The Court affirms a district court order denying a petition for a writ of *coram nobis*, ruling that the common-law writ of *coram nobis* is available in Nevada only for petitioners who are no longer in custody on the judgment being challenged and only to address errors of fact outside the record that were not known to the court entering the judgment, could not have been raised earlier, and affect the validity and regularity of the decision itself in that they would have precluded the judgment from being rendered.

Stilwell v. City of N. Las Vegas and City of Boulder City, 129 Nev. Adv. Op. No. 76 (October 31, 2013) – The Court dismisses consolidated appeals from district court orders denying motions for attorney fees and costs arising from Stilwell's convictions in municipals courts of riding a motorcycle without wearing proper headgear in violation of NRS 486.231. After Stilwell appealed his convictions to the district court for trial anew as provided by NRS 5.073(1) and NRS 266.595, the prosecution dismissed them with prejudice and refunded the fines and costs Stilwell had paid to exonerate bail and appeal his convictions. The district court subsequently denied Stilwell's motion for attorney fees and court costs pursuant to NRS 176.115, ruling that the municipal court convictions provided prima facie evidence of probable cause and malice was not independently claimed. The Court rules that pursuant to NEV. CONST. art. 6, § 6 the district court's appellate jurisdiction is final and the Court lacks jurisdiction.

Blanco v. Blanco, 129 Nev. Adv. Op. No. 78 (October 31, 2013) – The Court reverses a divorce decree entered by default in the district court in which a wife representing herself failed to comply with several of the husband's discovery requests and the district court entered a default divorce decree against her as a sanction. The Court rules that 1) it is not permissible to resolve child custody and child support claims by default as a sanction for discovery violations because the child's

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best interest is paramount and compels a decision on the merits; 2) as for the division of community property and debt, the court must make an equal disposition as required by statute; 3) regarding all other claims, the court may enter a default, but only after a thorough evaluation and express findings of whether less severe sanctions are appropriate; and 4) because the district court did not make any express findings as to appropriateness of less severe sanctions before entering the default, the default divorce decree is reversed and remanded for further proceedings.

Wynn v. Baldonado, 129 Nev. Adv. Op. No. 79 (October 31, 2013) – The Court reverses a district court order granting a petition for judicial review of the Nevada Labor Commissioner's decision regarding a tip-pooling policy and whether an administrative agency can grant class action certification, ruling that 1) NRS 608.160 allows employers to require employees to pool their tips with other employees of a different rank; and 2) the district court erred in failing to defer to the Labor Commissioner's interpretation of NAC 607.200 in declining class certification in the matter.

State v. Lloyd, 129 Nev. Adv. Op. No. 77 (October 31, 2013) – The Court reverses a district court order granting a motion to suppress evidence in a drug possession and trafficking case that originated when Lloyd ran a red light; during the subsequent stop, a drug detection dog's alert led to a warrantless automobile search. The Court rules that 1) the Nevada constitution compels no different automobile exception to its warrant requirement than the Fourth Amendment does; 2) the constitutional protection in the federal automobile-exception caselaw lies in the requirement of probable cause to believe the vehicle contains contraband or evidence of a crime and the car's inherent mobility, not the peripheral factors identified in State v. Harnisch (Harnisch II) [114 Nev. 225, 954 P.2d 1180 (1998)] and related caselaw; 3) exigency is not a separate requirement of the automobile exception to the constitutional warrant requirement; and 4) the drug detection dog's alert gave the officers probable cause to search Lloyd's car, which was parked in a public place and readily mobile (reversing the district court's order and remanding for further proceedings).

Civil Rights for Seniors v. AOC, 129 Nev. Adv. Op. No. 80 (October 31, 2013) – The Court affirms a district court order denying a petition for a writ of mandamus seeking to compel the Administrative Office of the Courts to disclose records under Nevada's Public Records Act related to Nevada's Foreclosure Mediation Program, ruling that the district court properly rejected access to the requested information based on the confidentiality provisions set forth in the Foreclosure Mediation Rules promulgated by the Court.

LVMPD v. Yeghiazarian, 129 Nev. Adv. Op. No. 81 (November 7, 2013) – The Court affirms a district court judgment in a wrongful death action arising from a traffic collision involving a police patrol car, and vacates in part a post-judgment order awarding attorney fees and costs, ruling that 1) the district court did not abuse its

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discretion by excluding evidence of the deceased's blood alcohol content (BAC) to show his comparative negligence, since admission requires additional evidence suggesting intoxication from either a percipient witness or an expert who can testify regarding that person's commensurate level of impairment; 2) the district court did not abuse its discretion in allowing an expert to testify based in part on a determination that the proposed testimony was the product of reliable methodology under Hallmark v. Eldridge [124 Nev. 492, 498, 189 P.3d 646, 650 (2008)]; 3) the district court correctly applied comparative negligence and calculated damages under NRS 41.035; 4) the district court did not abuse its discretion in awarding attorney fees that included charges for nonattorney staff; and 5) the award of attorney fees and costs is vacated in part and remanded for further analysis of the claims pursuant to the factors set forth in Brunzell v. Golden Gate National Bank [85 Nev. 345, 349, 455 P.2d 31, 33 (1969)].

Brooksby v. Nev. State Bank, 129 Nev. Adv. Op. No. 82 (November 7, 2013) – The Court reverses a district court order denying a petition for a hearing concerning the return of bank account funds under NRS 21.120 (third-party claims on writs of garnishment in aid of execution) and NRS 31.070 (third-party claims), and remands for an evidentiary hearing. In post-judgment proceedings below, a judgment creditor garnished the funds in bank accounts held by the judgment debtor jointly with her nondebtor children; the district court summarily denied a timely petition from the children asserting that the garnished funds belonged to them alone (a judgment creditor may garnish only a debtor's funds that are held in a joint bank account, not the funds in the account owned solely by the nondebtor).

State, Dep't of Taxation v. Masco Builder, 129 Nev. Adv. Op. No. 83 (November 7, 2013) – The Court affirms a district court post-judgment order awarding pre- and post-judgment interest in a tax case arising from a refund of overpaid taxes, ruling that 1) the taxpayer is not required to affirmatively request interest in its initial refund claim; and 2) the Department of Taxation may not withhold interest on tax refunds when it has failed to timely make a determination under NRS 372.665 as to whether any overpayment has been made intentionally or by reason of carelessness.

Elizondo v. Hood Mach., Inc., 129 Nev. Adv. Op. No. 84 (November 7, 2013) – The Court reverses a district court order denying a petition for judicial review in a workers' compensation matter, ruling that 1) the appeals officer's conclusory order in the matter lacked findings of fact and conclusions of law, failed to meet the statutory requirements of NRS 233B.125, and was procedurally deficient; and 2) the appeals officer erred by applying the doctrines of issue and claim preclusion to bar Elizondo's request to reopen his industrial injury claim under NRS 616C.390.

Humphries v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 85 (November 7, 2013) – The Court grants a writ petition challenging a district court order requir-

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ing the plaintiffs in a premises liability action to join the plaintiffs' assailant as a defendant, on the grounds that the assailant was a party necessary to the litigation. The Court rules that the assailant was not a necessary party under NRCP 19 because the district court can afford complete relief to the parties, the defendant is able to implead the assailant as a third party under NRCP 14, and creating a *per se* joinder requirement would unfairly burden plaintiffs.

Otak Nev., L.L.C. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 86 (November 7, 2013) – The Court grants a writ petition challenging a district court order declining to dismiss a third-party complaint, ruling that 1) NRS 17.245(1)(b) bars all claims that seek contribution and/or equitable indemnity when the settlement is determined to be in good faith; and 2) the contractor's remaining third-party claims in this matter are "de facto" contribution claims barred by NRS 17.245(1)(b).

Sandpointe Apts. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 87 (November 14, 2013) – The Court denies a writ petition challenging a district court order denying a motion for partial summary judgment and granting a countermotion for partial summary judgment in a deficiency and breach of guarantee action, ruling that 1) NRS 40.459(1)(c), a statute limiting the amount of judgments in instances where a right to obtain a judgment against the debtor, guarantor, or surety has been transferred from one person to another, would have an improper retroactive effect if applied to the facts underlying the writ petition; 2) NRS 40.459 (1)(c) only applies prospectively and the limitations in the statute apply to sales, pursuant to either judicial foreclosures or trustee's sales, occurring on or after the effective date of the statute; and 3) in cases where application of NRS 40.459(1)(c) would not have a retroactive effect, it applies to any transfer of the right to obtain a deficiency judgment, regardless of when the right was transferred.

PERS v. Reno Newspapers, 129 Nev. Adv. Op. No. 88 (November 14, 2013) – The Court affirms in part and vacates in part a district court order granting a petition for a writ of mandamus to compel public access to government records arising from the Reno Gazette-Journal's (RGJ) request for the names of all individuals who are collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments, as part of an investigation concerning government expenditures and the public cost of retired government employee pensions. The Court rules that NRS 286.110(3) protects only the individuals' files maintained by PERS and the district court correctly interpreted that statute's scope of confidentiality and did not abuse its discretion in ordering PERS to provide the requested information to the extent that it is maintained in a medium separate from individuals' files, but vacates the district court's order to the extent that the district court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records.

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Clancy v. State, 129 Nev. Adv. Op. No. 89 (November 27, 2013) – The Court affirms a jury conviction of leaving the scene of an accident, ruling that 1) NRS 484E.010 is not unconstitutionally vague or ambiguous; 2) actual physical contact between two vehicles is not required for a person to be involved in an accident under the statute; 3) the State is required to prove that the driver had actual or constructive knowledge that he had been involved in an accident; and 4) in this instance, sufficient evidence was presented to support the jury's finding that appellant knew or should have known that he was involved in an accident before leaving the scene.

Perez v. State, 129 Nev. Adv. Op. No. 90 (November 27, 2013) – The Court affirms a jury conviction of six counts of lewdness with a child under 14 years of age and two counts of sexual assault of a minor under 14 years of age in an appeal concerning the admissibility of expert testimony related to sex offender grooming behavior and the effect that behavior has on a child victim. The Court rules that 1) whether expert testimony on grooming behavior is admissible in a case involving sexual conduct with a child must be determined on a case-by-case basis, considering the requirements that govern the admissibility of expert testimony; 2) considering those requirements, the district court did not abuse its discretion in admitting the expert testimony in this case; 3) the expert's testimony did not improperly vouch for the complaining witness's testimony; and 4) the State's pretrial notice was sufficient.

Clay v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 91 (November 27, 2013) – The Court grants a writ petition challenging a juvenile court order unsealing and releasing petitioner's sealed juvenile court records for use in a criminal prosecution in which petitioner stands charged with two counts of first-degree murder and associated offenses for which he faces the death penalty. The Court rules that 1) neither NRS 62H.170(3) nor NRS 62H.170(2)(c) allow the State to inspect a person's sealed juvenile records for use against the person in subsequent criminal proceedings; and 2) the juvenile court therefore manifestly abused its discretion by unsealing and releasing petitioner's records.

In re Estate of Bethurem, 129 Nev. Adv. Op. No. 92 (November 27, 2013) – The Court reverses a district court order invalidating a will as the product of the beneficiary's undue influence (and directing distribution of property according to a former will), ruling that 1) a rebuttable presumption of undue influence is raised if the testator and the beneficiary shared a fiduciary relationship, but undue influence may also be proved without raising this presumption; 2) in the absence of the presumption, a will contestant bears the burden of proving undue influence by a preponderance of the evidence; and 3) the respondent-will contestants failed to meet this burden of proof.

Aspen Fin. Servs. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 93 (November 27, 2013) – The Court denies a writ petition challenging a district court order

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quashing a subpoena, ruling that 1) the motion to quash the subpoena properly asserted the news shield privilege under NRS 49.275; 2) assertion of the privilege may be raised, as it was here, by a reporter's attorney in a motion to quash a subpoena, without the need to file a supporting affidavit, so long as the motion demonstrates that the information sought by the subpoena is facially protected by the statute; and 3) petitioners have failed to overcome the privilege.

Watters v. State, 129 Nev. Adv. Op. No. 94 (November 27, 2013) – The Court reverses a jury conviction of possession of a stolen vehicle, grand larceny of a vehicle, and failure to stop on the signal of a police officer, ruling that 1) the State's use of a PowerPoint during opening statement that includes a slide of the defendant's booking photo with the word "GUILTY" superimposed across it constitutes improper advocacy and undermines the presumption of innocence essential to a fair trial; and 2) a presumption-of-innocence error is of constitutional dimension and the State failed to prove, beyond a reasonable doubt, that the error did not contribute to the verdict obtained (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Carrigan v. Nev. Comm'n on Ethics, 129 Nev. Adv. Op. No. 95 (November 27, 2013) – Remanded from the U.S. Supreme Court, Nev. Comm'n on Ethics v. Carrigan, 564 U.S. _, 131 S. Ct. 2343 (2011), which held that Sparks City Councilman Carrigan's vote on the Lazy 8 hotel/casino project did not constitute protected speech, and reversed the Nevada Supreme Court's decision in Carrigan v. Comm'n on Ethics, 126 Nev. _, 236 P.3d 616 (2010), that the First Amendment overbreadth doctrine invalidated the conflict-of-interest recusal provision in Nevada's Ethics in Government Law, NRS Chapter 281A. On remand, the Court affirms, ruling that the conflict-of-interest recusal provision in NRS 281A.420(2)(c) 1) is not unconstitutionally vague in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments, since NRS 281A.420(8)(e), which requires recusal for relationships "substantially similar" to four enumerated ones, can be clearly construed in reference to the enumerated relationships; and 2) does not unconstitutionally burden the First Amendment freedom-of-association rights shared by Nevada's elected officials and their supporters, since any burden is scant when compared to the state's important interest in avoiding conflicts of interest and self-dealing by public officials entrusted with making decisions affecting citizens.

Cnty. of Clark v. LB Props., Inc., 129 Nev. Adv. Op. No. 96 (December 12, 2013) – The Court reverses a district court order setting aside the Nevada Tax Commission's decision upholding the County Assessor's assessment of a remainder parcel for tax abatement purposes, ruling that the record supports the conclusion that the Assessor's method did not lead to unequal taxation but rather appears likely led to more equitable taxation than the method set forth in NAC 361.61038, appears to be the method generally used prior to the regulation's enactment and in harmony with NRS 361.4722(2)(a)(1), and since the

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Assessor's method does not conflict with existing statute or practice, it does not violate the Constitution.

In re Aboud Inter Vivos Trust, 129 Nev. Adv. Op. No. 97 (December 19, 2013) – The Court affirms in part and reverses in part a district court judgment in trust action concerning trust property that was transferred from the trust to a limited partnership for consideration and by consent of all of the trust beneficiaries, and subsequently transferred the property to a third-party business. The Court rules that 1) because in rem jurisdiction only extends to property and the disputed assets were no longer trust property after they were transferred to the limited partnership, NRS 164.010(1) and NRS 164.015(6) did not confer jurisdiction upon the district court to enter a constructive trust on those assets and a personal monetary judgment against the former trustee and third-party company; and 2) because the claims against the former trustee arose from alleged breaches of fiduciary duties to the limited partnership and not to the trust, the district court erred by entering a personal judgment against the former trustee in a trust accounting action.

2014 NEVADA GOVERNMENT CIVIL ATTORNEYS CONFERENCE

Harveys Resort – South Lake Tahoe, NV
May 7-9, 2014

The Nevada Advisory Council for Prosecuting Attorneys and the State Bar of Nevada Public Lawyers Section will co-sponsor the 2014 Nevada Government Civil Attorneys Conference, scheduled for May 7-9 at Harveys Resort at South Lake Tahoe, NV. This conference is an annual forum for networking and education on the critical issues facing government counsel representing state, municipal, county or other public entities. The conference will feature 10 hours of CLE presentations (including ethics and substance abuse), and the Public Lawyers Section annual meeting on May 8th.

Attendees may register directly through the Nevada Advisory Council for Prosecuting Attorneys at www.nvpac.nv.gov. REGISTRATION DEADLINE IS APRIL 18, 2014.

Attendees are responsible for making their lodging reservations; contact Harveys Resort at 1-800-455-4770 prior to April 7st and use group code S05NCG4 for the conference room rate of $69/night plus tax.

For further information, please contact Brett Kandt, Public Lawyers Section Chair, at (775)688-1966 or bkandt@ag.nv.gov.

Ninth Circuit Court of Appeals Cases

Crowley v. Bannister, _ F.3d _, No. 12-15804 (9th Cir. 2013) - A panel affirms in part and vacated in part the district court's summary judgment in a 42 U.S.C. § 1983 action brought by a Nevada state prisoner alleging deliberate indifference to his medical needs in the administration of his medication. The panel affirms the district court's grant of summary judgment in favor of defendant Dr. Bannister since plaintiff failed to submit evidence raising a genuine issue of material fact that his injury could have been avoided had Dr. Bannister implemented a policy allowing for the administration of three pill calls per day. The panel affirms the district court's grant of summary judgment in favor of defendants Warden Neven and nurses Grisham, Diliddo, and Balao-Cledera because Crowley expressly waived his appeal against them in his reply brief. The panel vacates the clerk's entry of judgment in favor of defendant Dr. Sussman, holding that, because the record did not reflect that the district court provided the required Rule 4(m) notice prior to the clerk's entry of judgment in favor of Dr. Sussman, plaintiff was precluded from attempting to show good cause or excusable neglect for his failure to serve Dr. Sussman in a timely manner. The panel also vacates the district court's decision denying plaintiff's request for leave to amend his second amended complaint to name additional defendants and to discover whether any delays on their part in providing medical treatment caused or exacerbated his Lithium toxicity. The opinion contains helpful analysis on supervisory liability for actions of subordinates: "[a] supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is 'a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" The panel remands with instructions to comply with Rule 4 (m) with respect to Dr. Sussman and to allow plaintiff leave to amend his second amended complaint.

Hagen v. City of Eugene, _ F.3d _, No. 12-35492 (9th Cir. 2013) – A panel reverses the district court's denial of defendants' motion for judgment as a matter of law, following a jury trial, in a 42 U.S.C. § 1983 action in which plaintiff alleged that defendants violated his First Amendment rights when they removed him from his position with the Eugene Police Department's K-9 team in retaliation for his repeatedly airing concerns about work-related safety issues to his supervisors. The panel held that defendants were entitled to judgment as a matter of law, concluding that the evidence presented to the jury did not reasonably permit the conclusion that plaintiff established a First Amendment retaliation claim, since he had "an official duty to report his safety concerns and thus spoke as a public employee when he repeatedly complained within the chain of command about work-related safety issues" rather than as a private citizen entitled to First Amendment protection.

Omnipoint Communications, Inc. v. City of Huntington Beach,_ F.3d _, No. 10-56877 (9th Cir. 2013) – Reversing the district court's judgment, a panel held

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that the Telecommunications Act of 1996 did not preempt the City of Huntington Beach's decision to require a company to obtain voter approval before constructing a mobile telephone antenna on city-owned park property. The panel held that 47 U.S.C. § 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations.

PUBLIC LAWYER COMPLIANCE WITH RPC 6.1

Recently all Nevada lawyers received an annual dues invoice from the State Bar of Nevada, which included a form for the mandatory reporting of pro bono activities as required by RPC 6.1.

It is crucial that the reporting under RPC 6.1 accurately reflect the contributions of public lawyers to improving access to justice for all Nevadans.

Please note that towards the bottom of the form there is a section to report hours of service "***of activities improving the law or law related education***." There is also a section to report hours of "***legal services to organizations that address the needs of persons of limited means***."

If you have any questions about compliance with RPC 6.1 or activities that may fall within the scope of the Rule, contact Brett Kandt, Public Lawyers Section Chair, at (775)688-1966 or bkandt@ag.nv.gov.

Stanton v. Sims, 571 U.S. _, 12-1217 (November 4, 2013) – Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity to police officer Stanton, who injured respondent Sims (when he kicked open a gate that struck Sims in her yard) while in hot pursuit of a misdemeanor suspect. Sims sued Stanton under 42 U.S.C. §1983, claiming that he violated her constitutional rights by searching her home without a warrant, and the district court granted Stanton summary judgment, finding that his actions were justified in light of the need to pursue the suspect and, alternatively, that he was qualifiedly immune because no clearly established law put him on notice that his actions were unconstitutional. The Ninth Circuit reversed, holding that Stanton's warrantless entry was unconstitutional because there was no immediate danger and because the suspect committed only a minor offense (disobeying a police officer). The court also denied Stanton qualified immunity, relying on Welsh v. Wisconsin, 466 U.S. 740 (1984), and United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) (en banc) (*per curiam*), as clearly establishing that the hot-pursuit doctrine does not apply to the pursuit of a suspect for a minor offense. Through a *per curiam* opinion, the Court reversed and held that Stanton was entitled to qualified immunity, ruling that neither *Welsh* nor Johnson clearly established that Stanton's conduct violated Sims' Fourth Amendment rights and that the Ninth Circuit read those decisions "far too broadly" (although the Court expressed no view on the underlying constitutional issue).

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Burt v. Titlow, 571 U.S. _, No.12-414 (November 5, 2013) – The Court unanimously reversed a Sixth Circuit decision that had granted habeas relief based on defense counsel's purported ineffectiveness in advising rejection of a plea offer, ruling that the Sixth Circuit failed to apply the "doubly deferential" standard of review when it refused to credit the state court's reasonable factual finding and assumed that counsel was ineffective where the record was silent.

Atlantic Marine Constr. Co. v. U.S. District Court for the Western District of Texas, 571 U.S. _, No. 12-929 (December 9, 2013) – The Court in a unanimous opinion specifies the procedure that is available for a defendant in a civil case who seeks to enforce a forum-selection clause, ruling that such a clause is not enforceable under 28 U.S.C. §1406(a) or FRCP 12(b)(3), which allow dismissal when venue is "wrong" or "improper" under the federal venue laws. Rather, such a clause is enforceable under 28 U.S.C. §1404(a), which authorizes district courts to transfer civil actions to other districts, and when a defendant requests a transfer under §1404(a) based upon a forum-selection clause, a district court should transfer the case "unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."

Sprint Communications, Inc. v. Jacobs, 571 U.S. _, No. 12-815 (December 11, 2013) – The Court in a unanimous opinion sets out the circumstances when a federal court should abstain under Younger v. Harris, 401 U.S. 37 (1971). The Court ruled that the Younger doctrine applies in only three circumstances: 1) it bars federal intrusion into ongoing state criminal prosecutions; 2) certain civil enforcement proceedings warrant abstention; and 3) federal courts should not interfere with pending "civil proceedings involving certain court orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." The Court held that the Eighth Circuit erred in affirming the federal district court's decision to abstain in this case, arising from a ruling from the Iowa Utilities Board that Sprint had to pay certain intercarrier access fees; Sprint subsequently filed suit against the Board in federal district court seeking declaratory and injunctive relief on the basis of federal preemption, while also appealing the Board's ruling in state court.

Kansas v. Cheever, 571 U.S. _, No. 12-609 (December 11, 2013) – The Court unanimously held that the Fifth Amendment's self-incrimination clause does not prohibit the government "from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut the defendant's presentation of expert testimony in support of a defense of voluntary intoxication." The Court concluded that "[w]hen a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him."