

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Recontrust Co. v. Zhang, 130 Nev. Adv. Op. No. 1 (January 30, 2014) – On an appeal and cross-appeal from judgment and orders entered following reversal and remand by a panel of the Court in a real property dispute, the Court vacates and remands for the district court to decide the lender's equitable subrogation claim, which neither the trial nor the prior appeals resolved.

Gonzales-Alpizar v. Griffith, 130 Nev. Adv. Op. No. 2 (January 30, 2014) – On an appeal and cross-appeal from a final determination concerning a complaint for divorce, the Court affirms in part and reverses in part, ruling that 1) a spousal and child support order entered by a family court in Costa Rica is not enforceable in Nevada under the Uniform Interstate Family Support Act (UIFSA); 2) because the existence of the parties' premarital agreement was not disclosed to the Costa Rican

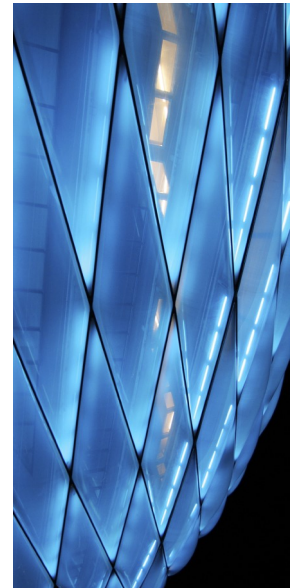
court issuing the support order, the award for spousal support should not be recognized in Nevada as a matter of comity; and 3) the child support award may be recognized under the doctrine of comity, and the Court remands for the district court to make factual findings on Griffith's claim that the child support was obtained through fraud because Gonzales-Alpizar misrepresented Griffith's income and assets to the Costa Rican court.

Torres v. Goodyear Tire & Rubber Co., 130 Nev. Adv. Op. No. 3 (January 30, 2014) – The Court affirms a post-judgment order refusing to award compound post-judgment interest, ruling that NRS 17.130(2), the statute that provides a default interest rate for judgments, does not authorize compound interest, but rather only allows for the award of simple interest on judgments.

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Section

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Chair



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Liberty Mut. v. Thomasson, 130 Nev. Adv. Op. No. 4 (February 6, 2014) – The Court vacates and remands a district court order transferring venue of a petition for judicial review in a workers' compensation matter, ruling that 1) NRS 233B.130(2)(b), which provides that a petition for judicial review of an agency determination must be filed in Carson City, the aggrieved party's county of residence, or the county where the agency proceeding occurred, is a mandatory jurisdictional requirement; and 2) because Liberty Mutual is not a resident of Washoe County, the Second Judicial District Court lacked jurisdiction to consider its petition for judicial review and should have dismissed it rather than transfer venue (remanded to the district court with directions to dismiss petition).

DTJ Design v. First Republic Bank, 130 Nev. Adv. Op. No. 5 (February 13, 2014) – The Court affirms a district court summary judgment, certified as final under NRCP 54 (b), in a lien foreclosure action, ruling that, regardless of whether a foreign firm employs a registered architect, NRS 623.349 (2) and NRS 623.357 mandate that the firm be registered in Nevada in order to maintain an action on the firm's behalf.

Preciado v. State, 130 Nev. Adv. Op. No. 6 (February 13, 2014) – The Court affirms a jury conviction of voluntary manslaughter with the use of a deadly weapon, ruling that while the district court erred in failing to record numerous bench and in-chambers conferences and in failing to excuse for cause a prospective juror who was equivocal about her impartiality, these errors were harmless. The Court stresses that bench and in-chambers conferences should

be memorialized either contemporaneously or by allowing counsel to make a record afterward; and that a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause.

Amezcua v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. No. 7 (February 13, 2014) – The Court denies a writ petition challenging a district court order affirming a judgment of conviction and denial of a motion for new trial, ruling that first-offense domestic battery under NRS 200.485(1) is a "petty" offense to which the right to a jury trial does not attach.

Lorton v. Jones, 130 Nev. Adv. Op. No. 8 (February 20, 2014) – The Court grants a writ petition challenging the eligibility of real parties in interest to run in the 2014 Reno mayoral election, ruling that Article 15, Section 3(2) of the Nevada Constitution bars a term-limited council member from thereafter being elected mayor of Reno based on the provisions of the Reno City Charter because 1) the Reno mayor is a member of the "local governing body," subject to the same limitations that apply to the other city council members and 2) while the Reno City Charter may assign additional duties to the Reno mayor, none of those added duties change the equality of all of the members of the city council or provide a basis for the unequal application of the limitations provision to all members of the "local governing body."

Gunderson v. D.R. Horton, Inc., 130 Nev. Adv. Op. No. 9 (February 27, 2014) – On an appeal and cross-appeal from a district court judgment on a jury verdict in a

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construction defect action and an appeal from an order denying a new trial, the Court affirms the district court's order denying the homeowners' motion for a new trial, reverses the district court's order regarding the issuance of sanctions, and remands. The Court rules that the district court did not abuse its discretion in denying appellants'/cross-respondents' motion for a new trial based on allegations of attorney misconduct, but did abuse its discretion regarding the issuance and apportionment of sanctions. Specifically, the Court rules that 1) the district court was statutorily required to issue sanctions under NRS 17.115 and NRCP 68; 2) when a district court issues sanctions against multiple offerees pursuant to NRS 17.115 and NRCP 68, it has and must exercise its discretion to determine whether to apportion those sanctions among the multiple offerees or to impose those sanctions with joint and several liability; 3) when sanctions are issued against multiple homeowner offerees pursuant to NRS 17.115 and NRCP 68 in a construction defect action, a district court abuses its discretion by imposing those sanctions jointly and severally against the homeowners; and 4) on remand the district court must apportion sanctions issued against the homeowners based on their individual offers of judgment.

Sanchez-Dominguez v. State, 130 Nev. Adv. Op. No. 10 (February 27, 2014) – The Court affirms a jury conviction of first-degree murder with the use of a deadly weapon, aggravated stalking, and burglary, clarifying that the meaning of "in the perpetration or attempted perpetration of"

a burglary under the first-degree felony murder statute does not require that a killing must be caused by, and occur at the exact moment of, a burglar's entry into a protected structure, because NRS 200.030(1) (b) holds felons strictly responsible for killings that result from their felonious actions (the killing in this instance occurred after the burglary offense was complete).

Jones v. Nev. Comm'n on Jud. Discipline, 130 Nev. Adv. Op. No. 11 (February 27, 2014) – The Court denies a writ petition seeking relief in a judicial discipline proceeding against Nevada Family Court Judge Steven E. Jones, ruling that the petition is premature as most of the issues raised are not yet ripe for review, since "at this investigatory stage in the judicial discipline proceedings, Judge Jones has not demonstrated actual prejudice stemming from any procedural or substantive violations sufficient to warrant writ relief at this time, although he may be able to establish such harm in the future."

City of Reno v. Howard, 130 Nev. Adv. Op. No. 12 (February 27, 2014) – The Court affirms a district court order denying a writ petition challenging the admissibility of the declaration of a person who collects blood for evidentiary testing under NRS 50.315(4), and the provision in NRS 50.315(6) that a defendant in a misdemeanor DUI trial waives the right to confront the maker of such a declaration unless the defendant can show a substantial and bona fide dispute regarding the facts in the declaration. The Court rules that, in light of the U.S. Supreme Court ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S.

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305 (2009), the substantial-and-bona-fide-dispute requirement of NRS 50.315(6) impermissibly burdens the right to confront the declarant [overruling City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005)]. The Court further rules that the district court in this instance did not err when it determined that admission of such a declaration into evidence over the defendant's objection would have violated defendant's right to confrontation, and the district court did not abuse its discretion by denying the City's petition for a writ of mandamus.

Las Vegas Sands v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. No. 13 (February 27, 2014) – The Court grants a writ petition challenging a district court order compelling disclosure of purportedly privileged documents, ruling that a witness's review of purportedly privileged documents prior to testifying constitutes a waiver of any privilege under NRS 50.125, such that the documents become subject to discovery by an adverse party; however, under the specific facts of this case, where the adverse party failed to demand production, inspection, cross-examination, and admission of the documents at or near the hearing in question and instead waited until well after the district court had entered its order, the demand was untimely under NRS 50.125(1).

In re Cay Clubs, 130 Nev. Adv. Op. No. 14 (March 6, 2014) – On consolidated appeals from a district court summary judgment certified as final under NRCP 54(b) and from an order awarding costs, in a case arising from appellants' purchase of condo-

miniums in the Las Vegas Cay Club development and subsequent lawsuit against numerous defendants, including Cay Clubs and respondents, the Court rules that 1) due to genuine issues of material fact, the district court erred in granting summary judgment to respondents with regard to their liability under the partnership-by-estoppel doctrine codified in NRS 87.160(1); 2) partnership by estoppel may be found under NRS 87.160(1) where the subject of the actionable representation is a partnership or a joint venture; 3) the consent required for partnership by estoppel can be express or implied from one's conduct; 4) the statute's phrase "given credit" means giving credence to the representation by detrimentally relying on it; 5) the claimant who seeks to prevail on the partnership-by-estoppel claim must have reasonably relied on the representation of partnership or joint venture; and 6) NRS 87.160(1) may impose partnership liability with respect to claims that implicate the reliance element that is required for partnership by estoppel—such claims are not limited to causes of action that sound in contract. The Court reverses in part the order granting summary judgment in favor of respondents with respect to their liability under NRS 87.160(1), reverses the award of costs that was predicated on the grant of summary judgment to respondents, and remands for further proceedings.

Harrah's v. State, Dep't of Taxation, 130 Nev. Adv. Op. No. 15 (March 20, 2014) – The Court affirms in part and reverses in part a district court order denying a petition for judicial review in a tax matter

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arising from the application of Nevada's use tax to aircraft purchased out of state and used to transport Harrah's executives and customers to and from its establishments worldwide. The Court rules that because two of Harrah's aircraft engaged the presumption of NRS 372.258 [goods purchased outside of Nevada are presumed not to be purchased for use in Nevada, and thus not taxable under Nevada's use tax statute, if 1) the first use of the goods occurs outside Nevada and 2) the goods are continuously used in interstate commerce for 12 months] and the record does not rebut the presumption, the Department of Taxation erred in its interpretation of the statute and those aircraft are not subject to Nevada's use tax.

Davis v. State, 130 Nev. Adv. Op. No. 16 (March 27, 2014) – The Court reverses a jury conviction of battery with the use of a deadly weapon resulting in substantial bodily harm and remands for new trial, ruling that NRS 200.275 unequivocally provides that battery is justifiable in self-defense under the same conditions that would justify homicide, and by refusing to provide an instruction to that effect, the district court committed reversible error.

Liu v. Christopher Homes, L.L.C., 130 Nev. Adv. Op. No. 17 (March 27, 2014) – The Court affirms in part, reverses in part, and remands a district court judgment in a real property action, ruling that the appellant may recover attorney fees incurred in defending against third-party litigation due to respondents' breach of contract [citing Sandy Valley Associates v. Sky Ranch Estates Owners Association,

117 Nev. 948, 957, 35 P.3d 964, 970 (2001)].

State v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. Adv. Op. No. 18 (March 27, 2014) – The Court grants a writ petition challenging a district court order that granted the defendant's motion to disqualify the entire Clark County District Attorney's Office due to District Attorney Steve Wolfson's disqualification from prosecuting former clients of his criminal defense practice. The Court rules that the conflict of interest cannot be properly imputed to all of the lawyers in his office, thus overruling Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982), to the extent that it relies on appearance of impropriety to determine when vicarious disqualification of a prosecutor's office is warranted. The Court further holds that, while an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases, rather than making that determination based on an appearance of impropriety, the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified. Finally, the Court rules that regardless of which standard is applied, under the circumstances and considering the screening procedures in place, the district court acted arbitrarily or capriciously in granting the motion to disqualify the entire Clark County District Attorney's Office.

Progressive Gulf Ins. Co. v. Faehnrich, 130 Nev. Adv. Op. No. 19 (March 27, 2014) – The Court answers a question certified under NRAP 5 concerning the enforceabil-

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ity of a household exclusion clause in an automobile liability insurance policy issued out of state but applied to Nevada residents injured in Nevada, ruling that Nevada's public policy does not preclude giving effect to a choice-of-law provision in an insurance contract that was negotiated, executed, and delivered while the parties resided outside of Nevada, even when that effect would deny any recovery under NRS 485.3091 to Nevada residents who were injured in Nevada.

Wingco v. Gov't Emps. Ins. Co., 130 Nev. Adv. Op. No. 20 (March 27, 2014) – The Court affirms a district court order dismissing an insurance action, ruling that NRS 687B.145(3), which provides that a motor vehicle insurer must offer its insured the option of purchasing medical payment coverage, does not require a written rejection of such coverage, and that all of the appellant's claims proceed from the mistaken premise that a written rejection is required.

The Power Co. v. Henry, 130 Nev. Adv. Op. No. 21 (March 27, 2014) – The Court affirms a district court judgment in a tort action, ruling that NRCP 41(e)'s provision requiring dismissal for want of prosecution does not apply to an action in which the parties entered into a written and signed settlement agreement before NRCP 41(e)'s five-year deadline expired, and the district court did not err in reducing the parties' settlement agreement to judgment.

Coleman v. State, 130 Nev. Adv. Op. No. 22 (March 27, 2014) – The Court affirms a district court order denying a post-

conviction petition for a writ of habeas corpus, ruling that a person who is serving a special sentence of lifetime supervision may not file a post-conviction petition for a writ of habeas corpus to challenge his judgment of conviction or sentence: because lifetime supervision commences only after a person has expired a prison term or period of probation or parole, a person who is subject only to lifetime supervision is not subject to an unexpired prison term that could be imposed upon violation of the conditions of that supervision and therefore is no longer under "sentence of death or imprisonment" as required by NRS 34.724(1).

Huckabay Props. v. NC Auto Parts, 130 Nev. Adv. Op. No. 23 (March 27, 2014) – The Court denies a petition for en banc reconsideration of an order dismissing consolidated appeals for failure to file opening brief and appendix, ruling that 1) although Nevada appellate law and procedural rules demonstrate a policy preference for merits-based resolution of appeals, noncompliance with court rules and directives risks forfeiting appellate relief; 2) in these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals; and 3) Hansen v. Universal Health Services of Nevada, Inc., 112 Nev. 1245, 924 P.2d 1345 (1996), is overruled to the extent that it holds against dismissing an appeal when the dilatory conduct is occasioned by counsel and not the client.

State v. Cantsee, 130 Nev. Adv. Op. No. 24 (April 3, 2014) – The Court reverses a

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district court order granting a motion to suppress evidence in a criminal case arising from respondent's being charged with a felony DUI after being pulled over for driving with a cracked windshield, ruling that a police officer's citation to an incorrect statute is not a mistake of law that invalidates an investigatory traffic stop under the Fourth Amendment if another statute nonetheless prohibits the suspected conduct.

Angel v. Cruse, 130 Nev. Adv. Op. No. 25 (April 3, 2014) – The Court reverses a district court summary judgment in a civil rights action filed by inmate Angel against respondent corrections officer Cruse, in his individual capacity only, alleging that Cruse violated Angel's civil rights by filing a disciplinary charge against him and having him placed in administrative segregation in retaliation for Angel attempting to file a grievance against Cruse. The Court rules that there are genuine issues of material fact remaining with regard to each of the disputed elements of the retaliation claim, including whether the action was taken because of Angel's protected conduct, whether the action advanced a legitimate correctional goal, and the possible chilling effect of Cruse's actions, and with regard to Cruse's entitlement to qualified immunity.

Coleman v. State, 130 Nev. Adv. Op. No. 26 (April 3, 2014) – The Court reverses a jury conviction of first-degree murder by child abuse following the death of an infant and remands, ruling that NRS 51.345 is constitutional but clarifying that the standard for admissibility of a statement

against penal interest offered to exculpate an accused— "corroborating circumstances [that] clearly indicate the trustworthiness of the statement"—must not be so rigorously applied that it ignores the purpose for the rule and instead infringes on the defendant's constitutional right to a meaningful opportunity to present a complete defense. The Court further holds that the district court's application of this provision in deciding not to allow the testimony from two defense witnesses was an abuse of discretion and prejudiced the defendant.

Nassiri v. Chiropractic Physicians' Bd., 130 Nev. Adv. Op. No. 27 (April 3, 2014) – The Court affirms a district court order granting in part and denying in part a petition for judicial review in a professional licensing matter, ruling that 1) in the absence of a specific statutory mandate, agencies generally must utilize, at a minimum, the preponderance-of-the-evidence standard in their adjudicative hearings as it is the general civil standard of proof; 2) in this instance the Board found, by at least a preponderance of the evidence, that appellants committed professional misconduct based on the evidence presented; and 3) there was no equal protection violation.

Alcantara v. Wal-Mart Stores, Inc., 130 Nev. Adv. Op. No. 28 (April 3, 2014) – The Court affirms a district court order, certified as final under NRCP 54(b), dismissing Wal-Mart Stores, Inc., from a torts action on claim preclusion grounds, in an appeal concerning the application of claim and issue preclusion to actions brought under different subsections of Nevada's wrongful

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death statute, NRS 41.085. In the underlying action, an heir asserted a wrongful-death claim against respondent Wal-Mart under NRS 41.085(4), even though the decedent's estate had previously attempted, but failed, to succeed on a wrongful death claim against Wal-Mart under NRS 41.085(5). Wal-Mart moved to dismiss the heir's action on claim and issue preclusion grounds, and the district court granted the motion based on claim preclusion. On appeal, the Court affirms the dismissal on issue preclusion grounds, following Evans v. Celotex Corp., 238 Cal. Rptr. 259, 260 (Ct. App. 1987), to conclude that the heir is barred from relitigating the issue of Wal-Mart's negligence because it has already been established, in the case brought by the estate on her behalf, that Wal-Mart was not negligent and, thus, not liable. The Court also adopts the Restatement (Second) of Judgments' explanation of what constitutes adequate representation for privity purposes.

LaChance v. State, 130 Nev. Adv. Op. No. 29 (April 3, 2014) – The Court affirms in part and reverses in part a jury conviction of domestic battery by strangulation, domestic battery causing substantial bodily harm, possession of a controlled substance for the purpose of sale, possession of a controlled substance, false imprisonment, and unlawful taking of a motor vehicle. The Court rules that 1) the charge of possession of a controlled substance is a lesser-included offense of possession of a controlled substance for the purpose of sale and appellant may not be punished for both crimes; 2) to remedy the double-jeopardy violation, the conviction for sim-

ple possession is reversed as the less severely punishable offense; and 3) the remainder of the judgment of conviction, including the adjudication of appellant as a habitual criminal, is affirmed.

Meisler v. State, 130 Nev. Adv. Op. No. 30 (April 3, 2014) – The Court affirms a jury conviction of aggravated stalking arising from a case in which law enforcement, after procuring a valid arrest warrant, located appellant by retrieving his cell phone's GPS coordinates from his cell phone service provider. Once appellant was in custody, law enforcement procured a valid search warrant for the contents of the cell phone, and the search of the cell phone revealed numerous text messages, some of which were eventually used to support the conviction. The Court rules in pertinent part that “an arrest warrant that justifies the physical invasion of the home also justifies a digital invasion into a defendant's cell phone for the purpose of locating the defendant” and that, because appellant's Fourth Amendment rights were not violated, the text messages were not fruit of the poisonous tree.

Douglas v. State, 130 Nev. Adv. Op. No. 31 (May 1, 2014) – The Court affirms a judgment of conviction for sexual assault and incest, rejecting petitioner's argument that incest requires mutual consent while sexual assault is, by definition, nonconsensual, making the two crimes mutually exclusive, and holding that incest condemns sex between close relatives without regard to whether the intercourse was consensual. The Court further rejects pe-

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itioner's double jeopardy challenge, holding that 1) sexual assault and incest each contain an element not contained in the other since incest requires a familial relationship [NRS 201.180], while sexual assault does not [NRS 200.366]; and 2) sexual assault makes nonconsent of the other party a clear condition for conviction while incest does not [citing *Jackson v. State*, 128 Nev. , 291 P.3d 1274, 1278 (2012)].

TRACY CHASE RECIPIENT OF 2014 JAMES M. BARTLEY DISTINGUISHED PUBLIC LAWYER AWARD

Tracy L. Chase was presented with the 2014 James M. Bartley Distinguished Public Lawyer Award by the Public Lawyers Section during the Section's annual meeting on May 8 at South Lake Tahoe.

Tracy has served as Chief Deputy City Attorney for the City of Reno since 2006. Prior to joining the Reno City Attorney's Office in 1998, Tracy was a shareholder at Hale, Lane, Peek, Dennison and Howard. She also served as a prosecutor at the Washoe County District Attorney's Office and clerked for the Honorable James J. Guinan in the Second Judicial District Court for the State of Nevada.

Throughout the course of her career at the City Attorney's Office, Tracy has exhibited dedication and innovation as legal counsel to a growing municipality, has mentored numerous attorneys, has led by example, and has maintained the highest professional standards as a public lawyer.

Patel v. City of Los Angeles,_ F.3d __, No. 08-56567 (9th Cir. 2013) – The en banc court reversed the district court's judgment in favor of the City of Los Angeles, and held that Los Angeles Municipal Code § 41.49's requirement that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection" was facially invalid under the Fourth Amendment insofar as it authorized inspections of the records and imposed penalties for non-compliance without affording an opportunity to obtain prior judicial review.

Wagner v. County of Maricopa,_ F.3d __, No. 10-15501 (9th Cir. 2013) – The panel amended a prior amended opinion and dissent filed on February 13, 2013, reversed the district court's judgment entered following a jury trial and remanded, and denied a petition for rehearing and a petition for rehearing en banc on behalf of the court, in an action brought by the Estate of Eric Vogel asserting that County of Maricopa jail officials were partially responsible for Vogel's death from acute cardiac arrhythmia following his release from jail. Plaintiff alleged that jail officers subjected Vogel, who suffered from a mental illness, to an unreasonable search and seizure while he was a pretrial detainee when, prior to transferring Vogel into the jail's psychiatric unit, defendants subjected him to a "dress out" during which they forcibly changed him into a jail uniform. The panel held that the district court erred by limiting the testimony of Vogel's sister at trial under the hearsay rule because her statements were offered to establish Vogel's state of mind rather

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than to prove the details of the incidents at the jail. In the new amended opinion, the panel held that on remand plaintiff may prevail on the proposition that for the jail to apply the dress-out procedure automatically to a man its own staff had identified as in need of psychiatric treatment was in deliberate indifference to his serious medical needs. The panel held that because of the evidentiary rulings of the trial court, the issue was not properly presented to the jury. In addition, the panel held that the district court's rulings deprived plaintiff of any foundation for medical testimony as to the probable cause of Vogel's death (the panel did not reach the admissibility of the medical testimony).

Sheehan v. City and County of San Francisco, _ F.3d __, No. 11-16401 (9th Cir. 2014) – The panel affirmed in part and reversed in part the district court's summary judgment and remanded in an action brought under 42 U.S.C. § 1983, the Americans with Disabilities Act, and state law, alleging that police officers violated plaintiff's rights when they entered her residence without a warrant and shot her after she threatened them with a knife. The panel held that the officers were justified in entering plaintiff's home *initially* under the emergency aid exception because they had an objectively reasonable basis to believe that plaintiff was in need of emergency medical assistance and they conducted the search or seizure in a reasonable manner up to that point. The panel also held that the district court properly rejected plaintiff's claims of municipal liability under Monell v. Department of Soc. Servs. of the City of New

York, 436 U.S. 658 (1978). The panel held that a jury could find that the officers acted unreasonably by forcing a second entry into plaintiff's residence and provoking a near-fatal confrontation. The panel held that plaintiff presented a triable issue of the unreasonable use of deadly force under a provocation theory. The panel held that Title II of the Americans with Disabilities Act applies to arrests and on the facts presented in this case, there was a triable issue whether the officers failed to reasonably accommodate plaintiff's disability when they forced their way back into her room without taking her mental illness into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness. Finally, the panel vacated summary judgment on plaintiff's state law claims and remanded for further proceedings.

Gonzalez v. City of Anaheim, _ F.3d __, No. 11-56360 (9th Cir. 2014) – Gonzalez's successors brought a 42 U.S.C. § 1983 action after he was shot and killed during an encounter with two Anaheim police officers; the district court entered summary judgment in favor of defendants. The en banc court reversed the district court's summary judgment and remanded on a Fourth Amendment excessive deadly force claim, and affirmed the district court's summary judgment as to a Fourteenth Amendment claim and a nondeadly force portion of the Fourth Amendment claim. The court, noting that because Gonzalez is dead, the police officers are the only witnesses able to testify as to the events that led to Gonzalez's death, ruled

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that based on the record, a verdict in favor of the defendants on the claim of excessive deadly force was not the only conclusion that a reasonable jury could reach, since there was significant inconsistency in the officers' testimony regarding what happened during the few seconds before Gonzalez was shot in the head. The court further held that the constitutional standard for using force less than deadly force was lower and that given the circumstances, defendants were entitled to summary judgment on the uses of force leading up to the gunshot. Finally, the court affirmed the district court's summary judgment for defendants as to plaintiffs' claim that they had been deprived of a familial relationship with Gonzalez in violation of their Fourteenth Amendment right to substantive due process, holding that plaintiffs produced no evidence that the officers had any ulterior motives for using force against Gonzalez.

Lal v. California,_ F.3d __, No. 12-15266 (9th Cir. 2014) The panel affirmed the district court's summary judgment which found that police officers were entitled to qualified immunity in a 42 U.S.C. § 1983 action alleging that the officers used excessive force when they shot and killed Kamal Lal following a high speed chase. The panel held that under the totality of the circumstances, the district court's determinations that the officers objectively feared immediate serious physical harm and that a reasonable officer could have believed that Lal threatened him with immediate serious danger were sound. Although Lal may have been intent on committing "suicide by cop," it did

not negate the fact that he threatened the officers with such immediate serious harm that shooting him was a reasonable response.

Rivera v. County of Los Angeles,_ F.3d __, No. 11-57037 (9th Cir. 2014) – The panel affirmed the district court's summary judgment in an action in which plaintiff, Santiago Rivera, alleged multiple constitutional and state law violations arising out of his mistaken arrest and month-long detention based on a 1989 warrant which had been issued for another person, also named Santiago Rivera. The panel rejected Rivera's claim that Los Angeles County violated the Fourth Amendment by issuing the 1989 warrant without including a number corresponding to the true subject's fingerprints, holding that the warrant satisfied the particularity requirement because it contained both the subject's name and a detailed physical description. The panel also held that San Bernardino sheriff's deputies were not unreasonable in believing that Rivera was the subject of the warrant at the time of arrest given that the name and date of birth on the warrant matched Rivera's and the height and weight descriptors were close to Rivera's true size. The panel held that Rivera's detention did not violate the Due Process Clause since Rivera had not presented any evidence that either Los Angeles County or San Bernardino County knew that Rivera was not the true subject of the warrant. Finally, the panel affirmed the district court's dismissal of Rivera's state law claims on the basis of state law statutory immunities.

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Dariano v. Morgan Hill Unified Sch. Dist.,_ F.3d _, No. 11-17858 (9th Cir. 2014) – The panel affirmed the district court’s summary judgment in a civil rights suit brought by high school students who were asked to remove clothing bearing images of the American flag after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, ruling that school officials did not violate the students’ rights to freedom of expression, due process, or equal protection. The panel held that, given the history of prior events at the school, including an altercation on campus, it was reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real, that school officials anticipated violence or substantial disruption of or material interference with school activities, and that their response was tailored to the circumstances.

Green v. City and Cnty. of San Francisco,_ F.3d _, No. 11-17892 (9th Cir. 2014) –The panel reversed the district court’s order granting summary judgment in favor of defendants, affirmed the district court’s order denying partial summary for plaintiff, and remanded in an action brought pursuant to 42 U.S.C. § 1983 alleging wrongful detention, false arrest and excessive force. Plaintiff’s lawsuit arose out of a vehicular stop by San Francisco Police officers after their Automatic License Plate Reader mistakenly identified plaintiff’s car as a stolen vehicle. Without visually confirming the license plate, a police officer made a “high-risk” stop during

which plaintiff was held at gunpoint by multiple officers, handcuffed, forced to her knees, and detained for twenty minutes before the mistake was discovered and she was released. The panel held that there were triable questions as to whether 1) law enforcement had a reasonable suspicion to justify plaintiff’s initial detention; 2) plaintiff’s detention amounted to an arrest without probable cause; and 3) police officers used excessive force in effecting the detention. The panel further held that viewing the facts in plaintiff’s favor, it could not make a determination as a matter of law that the officer who made the initial stop was entitled to qualified immunity. Because questions of fact remained regarding defendants’ conduct, the panel also reversed the district court’s summary judgment as to the municipal liability and state law claims and affirmed the district court’s denial of partial summary judgment as to plaintiff.



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Hinton v. Alabama, 571 U.S. __, No. 13-6440 (February 24, 2014) – Through a *per curiam* opinion, the Court unanimously reversed an Alabama Court of Criminal Appeals decision that had rejected a capital defendant’s (Hinton’s) claim that he had received ineffective assistance of counsel. The key issue at trial was whether the bullets recovered from the crime scenes had been fired from Hinton’s gun; the state presented two experts on “toolmark evidence” who testified that they had. The trial court mistakenly told defense counsel that Alabama law capped at \$1000 the amount it could provide the defense to hire its own expert witness. Defense counsel did not object or request more funding; he instead hired what he admitted was an inadequate expert. Hinton was convicted and sentenced to death. The U.S. Supreme Court held that “the inexcusable mistake of law — the unreasonable failure to understand the resources that state law made available to him” — constituted inadequate assistance of counsel. The Court remanded so that the lower courts could address the prejudice prong: whether “there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted.”

Fernandez v. California, 571 U.S. __, No. 12-7822 (February 25, 2014) – In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that when one occupant of a premises consents to a warrantless search by police, “a physically present co-

occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” By a 7-2 vote, the Court held that the same result does not obtain when an occupant objects to police entry into the premises, is later arrested and removed from the premises, and then a co-occupant consents to the police’s entry. The Court concluded that *Randolph* “went to great lengths to make clear that its holding was limited to situations in which the objecting tenant is present,” and that (unlike the situation in *Randolph*) consensual entry by the police here was not contrary to “widely shared social expectations.”

Walden v. Fiore, 571 U.S. __, No. 12-574 (February 25, 2014) – Reversing the Ninth Circuit, the Court unanimously held that “a court in Nevada may [not] exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections in Nevada.” The Court ruled that “a plaintiff cannot be the only link between the defendant and the forum.” (This suit was a *Bivens* action against a DEA agent who seized respondent/plaintiff’s money at an Atlanta airport and allegedly drafted a false affidavit (in Atlanta) to show probable cause for forfeiture of the funds. The Ninth Circuit held that a district court in Nevada had personal jurisdiction over the DEA agent because he knew that submission of the false affidavit would affect persons with a “significant connection” to Nevada.)

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United States v. Castleman, 572 U.S. ___, No. 12-1371 (March 26, 2014) - Under 18 U.S.C. §922(g)(9), it is a crime for any person convicted of a “misdemeanor crime of domestic violence” to possess a firearm. The phrase “misdemeanor crime of domestic violence” is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that “has, as an element, the use or attempted use of *physical force*, or the threatened use of a deadly weapon.” *Id.* §921(a)(33)(A) (emphasis added). The Court unanimously held that respondent’s Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a “misdemeanor crime of domestic violence.” The Court reasoned that §921(a)(33)(A) incorporates the common law definition of “force,” which is mere offensive touching. The Court therefore reversed the Sixth Circuit, which had held that *Johnson v. United States*, 559 U.S. 133 (2010), dictates that “violent force” is required.

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. ___, No. 12-682 (April 22, 2014) – By a 6-2 vote, the Court held that a constitutional amendment adopted by Michigan voters that prohibits the use of race-based preferences as part of the admissions process for state universities does not violate the Equal Protection Clause. The Court therefore reversed an 8-7 decision by the en banc Sixth Circuit which held that the amendment denies minorities a “fair political process” by

reallocating political power so as to “place [] special burdens on a minority group’s ability to achieve its goals through [the political] process.” A three-Justice plurality opinion and a concurring opinion by Justice Breyer distinguished the principal decision upon which the Sixth Circuit and respondents relied, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); a concurring opinion by Justice Scalia (joined by Justice Thomas) would have overruled that decision.

Prado Navarette v. California, 572 U.S. ___, No. 12-9490 (April 22, 2014) – By a 5-4 vote, the Court held that the police, consistent with the Fourth Amendment, may stop a vehicle based on an anonymous tip about reckless driving even where the police did not personally observe reckless driving. The case arose from a traffic stop of a pickup truck by California Highway Patrol officers because it matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. As the officers approached the truck, they smelled marijuana, searched the truck’s bed, found 30 pounds of marijuana, and arrested petitioners. The Court found that under the totality of the circumstances, the officer had reasonable suspicion that the truck’s driver was intoxicated, the 911 call in this case bore adequate indicia of reliability for the officer to credit the caller’s account, and not only was the tip here reliable, but it also created reasonable suspicion of drunk driving.

White v. Woodall, 572 U.S. ___, No. 12-794 (April 23, 2014) – By a 6-3 vote, the Court

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held that the Sixth Circuit erred when it granted habeas relief based on respondent's claim that he was wrongly denied a "no adverse inference" instruction at the capital sentencing proceeding that followed his plea of guilty to murder and the statutory aggravating circumstances. In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that the Fifth Amendment requires a trial judge to instruct the jury at the guilt phase that it should not draw any adverse inferences against a defendant due to his failure to testify. In Mitchell v. United States, 526 U.S. 314 (1999), the Court disapproved a trial judge's drawing an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting the circumstances and details of the crime." The Sixth Circuit had concluded that those decisions, in combination, established respondent's entitlement to a no-adverse-inference instruction. Disagreeing, the Court explained that "Mitchell itself leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." Whether a no-adverse-inference instruction is required in these circumstances — an issue the Court did not resolve — is not "beyond any possibility for fair-minded disagreement," as required for relief under 28 U.S.C. §2254(d)(1). The Court in pertinent part stated that "[§] 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat that failure to do so as error."

Town of Greece, New York v. Galloway, 572 U.S. ___, No. 12-696 (May 5, 2014) — By a 5-4 vote, the Court held that the Town of Greece does not violate the Establishment Clause by opening its monthly town board meetings with a prayer delivered by volunteer clergy, primarily Christian clergy invoking explicitly Christian themes. In Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld the practice of starting legislative sessions with a religious invocation, and the Court here held that 1) neither Marsh nor the historical tradition upon which it relied requires that legislative prayer be "generic or non-sectarian" and 2) the town's practice did not coerce participation by non-adherents.

Tolan v. Cotton, 572 U.S. ___, No. 13-551 (May 5, 2014) — In a 42 U.S.C. §1983 action in which the plaintiff (Tolan) alleged that a police officer used excessive force in violation of the Fourth Amendment when the officer shot him on his parents' front porch, the Court through a *per curiam* opinion summarily reversed a Fifth Circuit decision that had granted summary judgment to the police officer. The Fifth Circuit held that, regardless of whether the officer used excessive force, he was entitled to qualified immunity because he did not violate a clearly established right. In reversing, the Court held that the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to the plaintiff with respect to the central facts of the case — such as whether Tolan's mother refused orders to remain calm and whether Tolan was verbally threatening the officer.