

ANNUAL SURVEY OF NEVADA LAW 2001

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ADMINISTRATIVE LAW

Banegas v. State Indus. Ins. Sys.
19 P.3d 245 (Nev. 2001)

Co-habitant not entitled to death benefits under Nevada statutory law where not legally recognized as a dependent.

Annabelle and Robert Banegas were unmarried cohabitants. Annabelle relied on Robert for financial support. Robert was killed in a work-related accident, and Annabelle sought death benefits from the State Industrial Insurance System (SIIS). SIIS denied her application, and Annabelle brought suit in district court under Nev. Rev. Stat. 616C.505(8), arguing that the statute "in all other cases" was a catchall that allowed non-factual dependants to claim benefits. The district court denied Annabelle's claims and Annabelle appealed.

The Nevada Supreme Court held that the legislature only intended to provide death benefits to persons in legally recognized relationships with the deceased. By reference to the title of the statute and other subsections, the court concluded that a cohabitant was not entitled to death benefits under Nev. Rev. Stat. 616C.505(8).

City of Las Vegas Downtown Redevelopment Agency v. Crockett
24 P.3d 553 (Nev. 2001)

No formal amendment of a redevelopment plan is required for an administrative interpretation constituting a fair construction of the original plan.

In order to facilitate the transfer of land to the Stratosphere Hotel and Casino for development, the City of Las Vegas Downtown Redevelopment Agency (Agency) filed eminent domain complaints against several landowners. Two of these owners opposed and moved to dismiss the complaint, arguing that the Agency's actions were beyond the scope of its mandate. The district court, using a "materiality" test to determine if the Agency was required to amend its redevelopment plan, found that the proposed actions were substantial and required the Agency to amend its plan. The district court subsequently dismissed the Agency's complaint, and the Agency appealed.

The Nevada Supreme Court held that vacating streets and relocating a park did not constitute a material deviation from or change to the redevelopment plan such that a formal amendment of the plan was mandated. The court noted that, while an approved redevelopment plan must be formally amended if materially changed, formal amendment is not necessary for an administrative interpretation of the plan's details. Redevelopment that is consistent with the approved redevelopment plan's express language or a fair construction of that language

does not require a formal amendment, given that there is no deviation from or change to the plan's general import.

City of North Las Vegas v. Pardee Constr. Co. of Nev.
21 P.3d 8 (Nev. 2001)

A City of North Las Vegas fee, which passes on the costs of Southern Nevada Water Authority Improvements, is a "cost-based fee" and not a "development impact fee."

Plaintiff Pardee Construction Company (Pardee) signed a development agreement with the City of North Las Vegas (City), wherein the City agreed not to impose any additional development-impact fees, and Pardee agreed to pay existing development-impact fees and any new cost-based fees. Subsequently, the City participated with six other southern Nevada municipalities to create the Southern Nevada Water Authority (SNWA). The SNWA developed a capital improvements plan in order to broaden existing water supply and provide for increasing demand. The SNWA passed its costs on to the City, and the City passed its costs directly to its consumers, including plaintiff. Plaintiff asserted that such costs are related to development, and are therefore prohibited under the City-Pardee agreement.

In ruling that the City's fee was "cost-based," the Nevada Supreme Court noted that the fee was based on actual costs, and that only actual costs were being passed onto consumers. In addition, the definition of "impact fees" must involve reference to Nev. Rev. Stat. 278B, which allows the City to charge impact fees to developers only after complying with numerous statutory provisions and in accord with a capital improvement plan. Here, no such plan was contemplated, and the court ruled the SNWA's improvements were not sufficiently related to the City's efforts to strengthen or build its own infrastructure.

City of Reno v. Civil Serv. Comm'n of the City of Reno
34 P.3d 120 (Nev. 2001)

Civil Service Commission approval is not required to lay off a city employee who can no longer fulfill an essential job requirement.

In 1996, the United States Congress amended the Gun Control Act of 1968, making it illegal for individuals convicted of domestic violence to carry firearms. An arbitrator allowed the City of Reno to lay off police officers that could no longer carry firearms as a result of this amendment. When the Civil Service Commission of the City of Reno refused to approve the layoffs, the City of Reno filed a writ of mandate, petition for judicial review, and complaint for declaratory judgment. The district court denied the writ of mandate and petition for judicial review, but granted declaratory judgment for the City. The City of Reno appealed and the Civil Service Commission cross-appealed.

The Nevada Supreme Court held that the City was not required to gain approval from the Civil Service Commission to lay off officers in this circumstance. The court found that, while the Civil Service Commission has authority over layoffs resulting from reductions in staff, the Commission's authority does not extend to layoffs of police officers who could no longer fulfill a job qualification, such as being unable to carry a firearm under federal law.

Chief Justice Maupin dissented, joined by Justice Agosti. The dissent asserted that the action constituted a dismissal, not a layoff, which can be appealed to the Civil Service Commission under section 9.050 of the City Charter. The City Charter gives the Commission authority over the selection, appointment, and promotion of employees in the civil service and gives employees the right to appeal regarding dismissals, demotions, suspensions, and disciplinary actions.

Clark v. Columbia/HCA Info. Servs., Inc.
25 P.3d 215 (Nev. 2001)

Immunity under the Health Care Quality Improvement Act (HCQIA) does not extend to a hospital and its peer review board when decisions are not made in furtherance of quality health care.

Appellant Clark was a child psychiatrist who practiced intermittently at Truckee Meadows Hospital (now known as West Hills Hospital). Clark was concerned that the hospital was not following established procedure in that it discharged patients prematurely, providing deficient child psychiatric care. Clark wrote letters and provided reports to outside agencies in an effort to bring the hospital's practices to light. He also complained that the hospital used his superior credentials to qualify an affiliate facility for accreditation, though the hospital knew that Clark was not employed there. The hospital reacted by holding peer review board meetings and subsequently revoking Clark's hospital privileges. The hospital alleged that Clark engaged in "activities or professional conduct which are disruptive to Hospital operations."

Clark filed an action in United States District Court, alleging violation of various antitrust provisions and claims based on state tort and contract law. The hospital filed a motion for summary judgment. The motion was granted on federal antitrust claims, stating that Clark did not produce evidence to support his claims and, even if he had, the defendants were immune under the Health Care Quality Improvement Act, 42 U.S.C. §§11111-11112.

A three-judge panel of the Nevada Supreme Court reversed and remanded. Defendants petitioned for rehearing, and the case was transferred for en banc consideration.

The Nevada Supreme Court held that the defendants were not immune because the peer review decision to revoke the plaintiff's staff privileges was not made in furtherance of quality health care. The court determined that Clark's privileges were revoked because of his whistle-blowing activities, which did not meet the objectives of § 11112 (a)(1).

Diamond v. Swick
28 P.3d 1087 (Nev. 2001)

A manufactured home dealer violates Nevada law by providing false information to a lender, even in the absence of dealer fraud or actual reliance by the lender.

Diamond, the administrator of the Nevada Manufactured Housing Division (Division), filed a complaint against the employees of Silver State Mobile Homes, Inc., seeking to revoke their dealer licenses for submitting false information to lending institutions by representing dealer rebates as actual cash

down payments on credit applications. On seventy-three credit applications, Silver State represented all, or part of, a dealer's rebate as a cash down payment. The applications were submitted to three lending institutions, only one of which was unaware of Silver State's practice.

The hearing officer concluded that knowledge of the information's falsity precluded a lender from receiving "false" information under Nev. Rev. Stat. 489.401(7). Furthermore, because of the lender's knowledge, the financing statements did not contain fraudulent information that would lead a lender to finance a home sale it would not otherwise have financed. The district court affirmed the administrative determination and denied the Division's petition for judicial review. The Division then appealed, contending the hearing officer based his decision on an error of law.

The Nevada Supreme Court first addressed the question of whether a manufactured home dealer's submission of a contract to a lender, which represented a dealer rebate as a cash down payment, would be deemed "false" for purposes of the statute, even if the lender knew of the falsity of the information. The court concluded that a plain reading of the statute does not require fraud or reliance because the statute was designed to protect all lenders, including those in the secondary market. Thus, by misstating the actual cash down payment, interest rate and credit standards would differ, artificially affecting the lending market.

Second, the court considered whether the Division was required to establish that the dealer intended to defraud, or that the lender relied on the incorrect information. The court concluded that neither intent nor reliance were necessary elements because the misrepresentations alone could result in increased lender losses, which would in turn result in higher interest rates on future loans, thereby affecting the integrity of the entire mobile and manufactured home lending system.

Employers Ins. Co. of Nev. v. State Bd. of Exam'rs
21 P.3d 628 (Nev. 2001)

A state entity's lease-purchase agreement is not a public debt where the lease contains a nonappropriation clause, limits recourse to the leased property, and does not create a long-term obligation binding future legislatures.

The State Board of Examiners (Board) decided not to review the merits of Employers Insurance Company of Nevada's (EICON) lease-purchase agreement with the State Department of Administration Buildings and Grounds Division (Department). The Board contended that the agreement was a public debt, and that it improperly lent the state's credit in violation of the Nevada Constitution. EICON, the lessor, disagreed, and petitioned the Nevada Supreme Court for a writ of mandamus compelling the Board to review the agreement.

The court ruled that the writ of mandamus application was an appropriate method to challenge the Board's decision, because the petition presented legal issues that implicated the Nevada Constitution and public policy. The court noted that although mandamus is an extraordinary remedy, it is appropriate when an important issue of law needs clarification and invocation of the court's original jurisdiction serves public policy, even though other remedies might be available. The court granted EICON's petition and ordered a writ of manda-

mus to be issued, finding that the agreement did not violate the Nevada Constitution.

The court first examined whether the lease-purchase agreement was a "public debt" and thus prohibited by Article 9, Section 3 of the Nevada Constitution. The court defined a public debt as an obligation that binds future legislatures to successive appropriations. The disputed agreement contained provisions specifically tailored to avoid binding future legislatures. For example, the EICON lease-purchase agreement contained an express nonappropriation clause, providing that, in the case of future nonappropriation, EICON could retake the office space. The agreement also provided that no recourse was available against the state or its agencies in the event the legislature should fail to appropriate necessary funds. Based on these provisions, the court held that the agreement was not a public debt in violation of Article 9, Section 3. The court overruled *State ex rel. Nevada Building Authority v. Hancock*, 468 P.2d 333 (Nev. 1970) and expanded on its more recent reasoning in *Business Computer Rentals v. State Treasurer*, 953 P.2d 13 (Nev. 1993), holding that, as a general rule, similar lease-purchase agreements will be upheld where the lease: (1) contains a nonappropriation clause; (2) limits recourse to the leased property; and (3) does not create a long-term obligation that is binding on future legislatures.

The court then addressed the Board's second assertion that the agreement lent the state's credit in violation of Article 8, Section 9 of the Nevada Constitution. This contention stemmed from a provision allowing EICON to assign its right to receive lease payments from the Department in order to obtain financing. The Board argued that this effectively placed the state's credit behind EICON's ability to obtain financing. The court ruled that the state violates Article 8, Section 9 only when it acts as a surety or guarantor for the debts of a company, corporation, or association. Here, no such situation existed, because the agreement did not make the state legally liable for EICON's debts.

Kintzler v. IRS

2001 U.S. Dist. LEXIS 15266 (D. Nev. 2001)

Where taxpayers failed to follow appropriate procedures in challenging an Internal Revenue Service levy, summary judgment was appropriate for a resulting civil rights violation complaint.

Taxpayers requested a Collection Due Process (CDP) hearing in a timely fashion after notification of penalties assessed for filing frivolous tax returns. Following receipt of the Notice of Determination from the CDP hearing officer, the taxpayers filed an appeal in Tax Court rather than filing the appropriate petition in United States District Court. The Tax Court dismissed the action for lack of jurisdiction. The taxpayers then filed suit, claiming violation of civil rights because the CDP hearing officer refused to discuss the merits of the levy with them at the hearing.

The district court granted the Internal Revenue Service's motion to dismiss, holding that CDP hearings offer a taxpayer the opportunity to request judicial review of process, not a review on the merits. Therefore, the hearing officer acted appropriately. Further, plaintiffs had ample opportunity to prove

the penalties were improper or, in the alternative, to refile corrected returns, and failed to do so.

McClanahan v. Raley's, Inc.

34 P.3d 573 (Nev. 2001)

An administrative officer's decision that is supported by substantial evidence is not open to appellate review by a district court.

Plaintiff McClanahan slipped and fell while working for the defendant. As a result, he developed avascular necrosis, a deteriorating hip condition, and filed a worker's compensation claim. In total, the parties sought four medical opinions regarding the cause of the hip condition. Two of these concluded that the fall was the cause of defendant's condition and two said the cause of the condition could not be determined.

Raley's denied McClanahan's claim, but an appeals officer decided that the claim was supported by substantial evidence. This decision was then overruled by a state district court. The district court reweighed the evidence and held that the claim was not supported by a preponderance of the evidence, since the medical opinions were evenly divided. McClanahan appealed.

The Nevada Supreme Court reversed the district court's opinion, holding that the court could only reweigh the evidence if the administrative officer's decision was not supported by substantial evidence. The court found that, although the number of medical opinions was evenly split, the preponderance of the evidence does not rely on the number of witnesses. Further, the administrative officer also relied on other witnesses, including the plaintiff's supervisor, whom he found to be credible. The court held that the evidence supporting the administrative officer's decision met that standard.

Rogers v. Heller

18 P.3d 1034 (Nev. 2001)

Initiative petition, which seeks to make an appropriation or to require expenditure, must also seek to constitutionally raise such funds.

Several businesses challenged an initiative petition that sought to increase the state's funding for elementary and secondary public schools. The initiative petition called for setting the level of funding for such schools at fifty percent of the state's projected revenue for the year. The initiative sought to raise the funds through a proposed four percent tax on the taxable income of each Nevada business. Plaintiffs sought declaratory and injunctive relief in district court, claiming both deficiencies in the initiative's qualification process and substantive constitutional deficiencies in the initiative itself. The court denied relief, holding that the initiative was intended as a supplement to school funding and, thus, not clearly unconstitutional. Plaintiffs appealed.

The Nevada Supreme Court held that Article 19, Section 6 of the Nevada Constitution requires that any proposed statute or amendment that includes an appropriation or expenditure of funds impose a tax or other constitutional method of raising revenue sufficient to fund the proposal. The court found the proposed four percent tax would only raise about \$270,000,000, while fifty percent of the state's general fund amounts to about \$750,000,000. Although the new tax would raise sufficient funds to increase current educational spend-

ing to the proposed level, the court held that the legislature is not required to fund at the current level. If the legislature were to allot less money to education, then the four percent tax would not be sufficient. Therefore, the court held that the initiative would have to include a proposal to raise enough revenue to sufficiently fund the entire financial requirement (\$750,000,000).

Justice Rose dissented, asserting that this would require any initiative petition to identify an independent source of revenue in order to be constitutional. He argued that this was too strict a holding for a process that should be liberally construed to preserve the will of the petitioners.

United States v. State Eng'r, State of Nevada
27 P.3d 51 (Nev. 2001)

The Bureau of Land Management may be granted water permits without actually holding livestock grazing permits in its own name.

Plaintiff, the Bureau of Land Management (BLM), applied to the State Engineer of Nevada (Engineer) for permits to create nine livestock watering holes in various locations. The BLM did not claim to actually have any livestock; it wanted only to grant the rights to individuals seeking grazing permits from the BLM. The Engineer denied the permits on the basis that the BLM was not legally considered an individual authorized to graze livestock on public land under Nev. Rev. Stat. 533.503. BLM petitioned for district court review of the Engineer's decision. The district court denied the petition and BLM appealed.

BLM asserted that the phrase "legally entitled" in the statute means either the landowner or the person with permission to graze livestock on the land. The Engineer argued that only those with permits to graze livestock were legally entitled and that BLM did not possess grazing permits.

The Nevada Supreme Court agreed with the petitioner that there was only one reasonable interpretation of the statute, and that the Engineer's interpretation, requiring the BLM to issue itself a permit, was illogical and unreasonable. The court reversed, holding that the Engineer had exceeded his authority by ignoring the plain meaning of the statute.

Justice Becker asserted that the statute was ambiguous, claiming that the legislature intended "legally entitled" to be interpreted in the manner that the Engineer read the statute. Justice Becker nonetheless concurred in the judgment, finding that the legislature's intent in Nev. Rev. Stat. 533.503 would violate the Supremacy Clause of the United States Constitution.

Univ. & Cmty. Coll. Sys. of Nev. v. DR Partners
18 P.3d 1042 (Nev. 2001)

The office of community college president is not a public office and, therefore, the interviewing of applicants for that office may be conducted in closed sessions.

Appellant, University and Community College System of Nevada (UCCSN), appealed from a district court order, enjoining it from interviewing applicants for the job of community college president in closed sessions. UCCSN argued that the district court's finding that the office of community college president is a public office was erroneous and that UCCSN was not

prohibited from interviewing presidential candidates in a closed session. Respondent DR Partners, commonly known as the Las Vegas Review Journal (RJ) newspaper, claimed that the office of community college president is a public office. RJ argued that although Nev. Rev. Stat. 241, Nevada's open meeting law, does not define "public office" or "public officer," it prohibits the presidential search committee from discussing a public officer's appointment behind closed doors.

The court ruled the position was not created by statute or state constitution, but by the Board of Regents in its bylaws, and, therefore, could not be viewed as a public office. Crucial to the court's ruling was Nev. Rev. Stat. 281, which governs public officers and defines a public officer as "a person elected or appointed to a position" that either is established by state constitution or statute, or by charter or ordinance of a state political subdivision, and involves the continuous exercise of a public power, trust, or duty as part of regular and permanent government administration.

Further, the court reversed the district court's injunctive order and disagreed with the RJ's reasoning that important presidential functions made the position a public office. The court held that, although the community college president holds an important position, it is ultimately the Board of Regents and the chancellor who maintain control over higher education.

Chief Justice Maupin, joined by Justices Young and Leavitt, dissented, agreeing with the RJ that the office satisfied the statutory criteria. The dissent argued that UCCSN and its governing Board was a political subdivision of the state and that their governing documents were analogous in purpose to a municipal body's charter. The dissent also argued that the position met the second statutory criteria, as the president has been entrusted by law with a significant part of the state's functions of higher education, a fact acknowledged by the majority.

BUSINESS LAW

Mallard Auto. Group, Ltd. v. LeClair Mgmt. Corp. **153 F. Supp. 2d 1211 (D. Nev. 2001)**

Commingling of a married couple's personal funds with those of a corporation owned by the wife creates genuine issues of material fact as to whether husband and corporation are alter egos.

David Smith owed the Internal Revenue Service (IRS) over \$1,000,000. His wife owned LeClair Corporation but employed her husband as manager, allowing him to make all the decisions concerning the operation of the business. During LeClair's existence, Smith and his wife paid their personal expenses out of LeClair's account and did not maintain any personal bank accounts.

When LeClair was sold to Mallard, the IRS claimed the proceeds, asserting that the doctrine of alter ego should allow reverse piercing of the corporate veil, and that LeClair's assets should be used to satisfy part of Smith's debt. Mallard filed an interpleader, and LeClair moved for summary judgment, arguing that the money belonged to Mrs. Smith and the corporation.

The court denied the motion, holding that genuine issues of material fact existed concerning whether the government could establish the three elements of the alter ego: 1) that Smith dominated and controlled LeClair; 2) that LeClair and Smith had unity of interest; and 3) that maintaining the fiction that Smith and LeClair were separate entities would result in a fraud on the public.

Trs. of the Cement Masons & Plasterers Health & Welfare Trust v. Fabel Concrete, Inc.

159 F. Supp. 2d 1249 (D. Nev. 2001)

Alter-ego status makes a company responsible for the commitments and obligations of its counterpart.

Old Republic posted a bond for Fabel Concrete (Concrete Bond) with the Nevada State Contractors Board and, approximately five months later, posted a second bond for Fabel Enterprise (Enterprise Bond). The application for Enterprise listed the company as a new business and made reference to the Concrete Bond and the common owner, Robert Fabel. Before issuing the bond, Republic reviewed the personal finances of Robert and Susan Fabel. After the first bond, but before the second bond, Fabel Concrete signed a labor agreement, requiring payments to the Trust Fund on behalf of covered employees. After signing the labor agreement, the Trust Fund sought delinquent payments from Fabel Concrete on behalf of the employees covered by the fund. In the interim, Fabel Concrete had closed operations and re-formed as Fabel Enterprise (a non-union shop), which refused to make the past payments. Old Republic, who stood as Fabel's surety, also refused to pay. The Trustees then brought an action to force payment.

Old Republic argued that it should not be liable for the Enterprise Bond because of Enterprise's fraud in listing itself as a new business on the bond application. However, the Nevada Supreme Court found that the parties had stipulated to the alter-ego status of Faber Enterprise and Faber Concrete. Thus, the court found that it only needed to determine if the alter-ego status required Old Republic to pay the Enterprise Bond.

The court found that, under Nev. Rev. Stat. 624.273(1), a surety bond must be available to benefit any employee of a contractor who performed labor on or near the construction site covered by a contract, or is injured by an unlawful act or omission of the contractor in the performance of the contract. Old Republic issued the surety bond to cover labor performed, regardless of whether Enterprise was or would enter into any labor agreement. As an alter-ego, Enterprise was held liable for any delinquent contributions to the Trust Funds.

CIVIL PROCEDURE

Allyn v. McDonald

34 P.3d 584 (Nev. 2001)

A motion to dismiss does not constitute a "trial" for purposes of Nev. R. Civ. P. 41(e).

Plaintiff Allyn contended that her lawyer, McDonald, while representing Allyn in a divorce action against her husband, promised to file a separate per-

sonal injury claim against the husband. When McDonald did not do so, Allyn filed a malpractice claim against McDonald. In the course of that litigation, the district court held that the issue of the husband's abuse towards Allyn had been litigated in the divorce action and could not be re-litigated in any new action under the *res judicata* doctrine.

McDonald subsequently moved to dismiss the malpractice claim, arguing that the *res judicata* holding gave Allyn's husband a complete defense and, as such, the failure to file a separate tort action did not cause Allyn damage. After the district court found for McDonald, Allyn sought leave to amend her complaint but did not submit the motion for several months. When she finally did submit the motion, McDonald moved to dismiss because Nev. R. Civ. P. 41(e) requires that an action be brought within three years of the remittur from the previous appeal. The court granted the motion and Allyn appealed.

The plaintiff contended that, when she challenged the defendant's motion to dismiss on *res judicata* grounds, the action was "brought to trial" for purposes of Nev. R. Civ. P. 41(e).

The Nevada Supreme Court determined that Nev. R. Civ. P. 41(e) required that an "action" be brought within three years, not just an "issue" involved in the case. Therefore, the defendant's motion to dismiss resolved only one issue and did not settle the entire action, requiring the application of the three-year time restriction. In addition, the court recognized the need for strict adherence to the guidelines set forth in Nev. R. Civ. P. 41(e), indicating that the time frame was a mandatory obligation for the court, regardless of the equities or circumstances surrounding the order of dismissal.

Anderson v. Kahre

2001 U.S. Dist. LEXIS 8180 (D. Nev. 2001)

Tax lien sale was proper where challenging party could offer no evidence that the sale was not proper or in accordance with United States Code or Nevada Revised Statutes.

Anderson bought Kahre's property at an Internal Revenue Service (IRS) auction. After the required six-month redemption period, Anderson received the deed and recorded it. Kahre contested the sale. Both sides filed actions to quiet title and Anderson moved for summary judgment.

The district court held that Kahre offered no evidence that the sale was improper or that the sale violated federal or state statutes governing tax lien sales. Since Kahre showed no interest, right, or title that he may have held when the IRS lien attached the property, the court granted Anderson summary judgment.

Badillo v. Am. Tobacco Co.

2001 U.S. Dist. LEXIS 10233 (D. Nev. 2001)

Plaintiffs' motions for class certification in lawsuits against several tobacco companies were denied because individual determinations required to reach a decision in the cases predominated and defeated the purpose of a class action suit.

The federal district court denied class certification for plaintiffs in four separate lawsuits against tobacco companies. The plaintiffs, smoking and non-

smoking casino workers exposed to second hand smoke during their employment, sought class certification in suits alleging various claims against their former employers, including continuing medical monitoring of developing disease.

On its own motion, the Nevada Supreme Court certified that Nevada common law does not recognize a cause of action for medical monitoring. The Nevada Supreme Court further noted that medical monitoring may be available as a remedy, but neither party had briefed the issue or set forth a cause of action for which it would provide a remedy.

In considering whether plaintiffs' motions for class certification should be granted, the federal district court concurred with the Nevada Supreme Court that Nevada common law does not recognize a medical monitoring cause of action and that the plaintiffs had failed to demonstrate a viable cause of action to which medical monitoring could properly be tied as a remedy.

On the issue of class certification, the court reviewed each of the proposed classes under Fed. R. Civ. P. 23, the governing rule for certifying a class. The court held that, although the plaintiffs did not specify the size of the respective classes, defendants did not contest the assertion that each plaintiffs' class would be so numerous that joinder of all members would be impracticable. However, the court held that the plaintiffs did not meet the commonality and predominance requirements, and the members of the proposed plaintiffs' classes presented many individual issues, making certification improper. Since these issues would necessarily be based on an individual assessment in each case, the ability to establish commonality and predominance was frustrated. Similarly, the typicality requirement was frustrated by plaintiffs' inability to demonstrate that the claims were typical of the entire class. Because plaintiffs failed on the commonality and typicality requirements, they could not adequately represent the interests of all members within their proposed classes, and certification was improper.

Cal. Retail Natural Gas & Elec. Antitrust Litig. v. S. Cal. Gas Co.
170 F. Supp. 2d 1052 (D. Nev. 2001)

Cases regarding California gas and electrical company trade practices were properly heard in state court, as they lacked federal subject matter jurisdiction.

In eight consolidated actions, the plaintiffs (representing various California natural gas and electric rate payers) sued to recover damages on behalf of those rate payers. They alleged defendants' conduct resulted in unfair business practices and unfair competition. The defendant removed the actions to federal district court. The plaintiffs moved to remand to state court.

The federal district court found that, while there is strong federal interest in the regulation of electricity and natural gas, there was no federal law at question sufficient to allow the federal court to exercise its limited jurisdiction over the matter. In denying federal subject matter jurisdiction over the claims, the court could not find any applicable federal law with language expressing complete exemption from state law. The court held that the claims fell within the strict guidance and power of the State of California and not under federal statute, and any applicable federal statute played only a limited role in the case.

Canterino v. Mirage Casino-Hotel
16 P.3d 415 (Nev. 2001)

Questions asked by jurors during deliberation must be presented to counsel.

Plaintiff Canterino was beaten and robbed while staying at the Mirage Hotel and Casino. Canterino alleged the Mirage's security efforts were deficient and the cause of his injuries. At trial, Canterino presented evidence of permanent physical, neurological, and psychological damage. Mirage denied liability and presented no evidence that contradicted plaintiff's characterization of his injuries. Six of the eight jurors found the defendant liable for those injuries.

The jury then requested instruction as to whether the two remaining jurors should participate in the determination of damages. After a failed attempt to contact counsel, the judge informed the jury that only those finding liability should determine damages. The jury awarded the plaintiff \$5.7 million. The judge found the jury's award excessive and influenced by prejudice, due to inflammatory comments made by Canterino's counsel at trial. The court entered a conditional order of remittal, reducing the verdict to \$1.5 million.

Canterino refused to accept the remittur and appealed, arguing that the remittur was improper and that the court had erred in not informing counsel of the jurors questions regarding damages.

On appeal, the Nevada Supreme Court found the trial court abused its discretion in ordering remittur where the defendant did not present evidence that the damages were excessive. Rather, the court found that the damages were amply supported by the evidence and that, while appeals to the jury by Canterino's attorney were improper, they were not sufficiently pervasive as to taint the jury's verdict. The court also noted that Mirage's counsel had not objected to opposing counsel's remarks.

The court found that Nevada law requires questions asked by the jurors during deliberations to be presented to counsel. However, if the judge answers the question correctly without first submitting it to trial counsel, the judge's actions are held to be harmless error. In this case, though, the court found that the judge's response was incorrect and ordered the case remanded for a damage determination with all jurors participating.

Justice Rose dissented in part, finding the attorney's misconduct influenced the jury's award and should be considered, even in the absence of an objection by counsel.

Chief Justice Maupin, in a concurring opinion, cautioned lower courts to exercise restraint in reviewing a record to determine attorney misconduct when there are no objections. He distinguished this case from the court's recent decision in *DeJesus v. Flick*, 7 P.3d 459 (Nev. 2000), finding misconduct when it was clear from the record that the jury disregarded evidence. Since no evidence on damages was presented by the defense in this case, that was clearly not the case. Justice Agosti concurred to note that the lower court had found the jury's damage determination to be amply supported by the evidence, while the jury in *DeJesus* had disregarded the evidence in arriving at its damage verdict.

Dahya v. County of Washoe
19 P.3d 239 (Nev. 2001)

Where service on an individual in a foreign country that has signed the Hague Convention is not performed under the methods prescribed by the convention or those methods acceptable within the foreign country wherein process is served, such service is not effective.

Casmyn Corporation (Casmyn) filed suit in Reno against Dahya, Casmyn's former president and CEO, alleging breach of fiduciary duty and fraudulent use of corporate expense accounts during Dahya's employment by Casmyn. Dahya was a naturalized Canadian citizen, and resided in Spain when San Pio, Casmyn's Spanish attorney, served process personally upon Dahya. Since no Spanish court had authorized San Pio to serve process, Dahya filed a motion, arguing that service was improper under the Hague Convention and failed to satisfy Spanish law. The court denied Dahya's motion, stating that Casmyn was entitled to bypass provisions for service specified in the Hague Convention because Casmyn complied with Article Nineteen. Article Nineteen permits a method of transmission allowed by the internal laws of the country wherein service is effectuated; since Spain did not object to the method of service, the district court held that Spain had "permitted" Casmyn to serve Dahya. Dahya appealed.

On appeal, the Nevada Supreme Court found in favor of Dahya, and reversed the trial court's decision. The court refuted the district court's interpretation of the Convention, holding that Article Nineteen's "permits" wording cannot be construed as broadly as attempted by the district court. The court noted that the Hague Convention was adopted with uniform guidelines on service in order to avoid the confusing patchwork of rules that would make litigation frustrating and difficult for foreign litigants. The court held that the Convention's intent to streamline service issues would be frustrated by an interpretation of "permits" that would allow for any service not objected to by the foreign state where service is effectuated. Such an interpretation would also impinge upon the sovereignty of foreign states. Moreover, the court's opinion that the district court's interpretation of "permits," "objects," and "opposes" is inconsonant with the purpose behind the Convention, is supported by different treatment of the words in other Articles of the Convention.

The Court also determined that, while personal service is allowed in Spain, Spanish law is silent regarding foreign service by an individual upon a resident who is not a Spanish citizen. Although both sides argued that Spain's silence on the matter favored its position, the court found that the weight of Spanish law supported Dahya's construction, that Spain does not permit service in such instances, and therefore San Pio's service was ineffective.

Dugan v. Gotsopoulos
22 P.3d 205 (Nev. 2001)

A party may testify as to the value of their own vehicle and the cost of a rental car in a personal injury action.

Dugan sued Gotsopoulos for injuries and damages resulting from a car accident in which both were involved. Dugan won, but appealed the calculation of damages, claiming the court erred in refusing to allow her to testify as to

compensatory damages resulting from the accident. The testimony rejected included her own testimony as to the value of her vehicle, the Kelley Blue Book price, and the cost of a rental vehicle.

The Nevada Supreme Court reversed, holding that Dugan should have been allowed to testify as to the value of her real or personal property because the value of the property was at issue in the action. Expert testimony is not required to value personal property. In addition, the court found the Kelley Blue Book to be an acceptable and reliable publication in the automobile industry for determining the value of an automobile, and evidence based on it should have been admitted. Finally, the court held that Dugan was entitled to recover damages for loss of use of her vehicle for the period of time she was unable to use the property, since the loss resulted from the subject of the action. A measure of such damages may be rental car costs for the period required to repair the vehicle. If the party does not actually rent a substitute vehicle due to lack of financial capacity, they may still provide evidence of the cost, in order to demonstrate the financial inconvenience and deprivation the owner suffered from the inability to use their property.

Graziose v. Am. Home Prod. Corp.
202 F.R.D. 638 (D. Nev. 2001)

Permissive joinder of plaintiffs is only allowed when the right to relief asserted by each plaintiff arises out of the same transaction or occurrence and there is a common question of law or fact.

Consumers who alleged they sustained injuries from over-the-counter medications sued various manufacturers and sellers of the medications. The claims varied in the type of medication and the nature of the damages. The plaintiffs did not name the exact same defendants in their various actions, although the claims were connected by the same ingredient in each of the medications. The defendants moved to sever the plaintiffs.

The district court stated that Fed. R. Civ. P. 20(a) required the right to relief asserted by each plaintiff to arise out of the same transaction or occurrence and that there be a question of law or fact common to all parties. If these requirements are not met, the actions may be severed as long as there is not substantial prejudice to the plaintiffs. The court found that the claims of the plaintiffs did not meet the requisites for joinder.

Meyer v. Sunrise Hosp.
22 P.3d 1142 (Nev. 2001)

District court has the right to review decisions made by private hospital review boards.

Plaintiff Meyer, a physician, saw a homeless patient in the hospital for seven minutes and released him. Within hours, the patient died of pneumonia. The hospital conducted a review of Meyer's care for the patient, and a hearing was held regarding the incident. As a result, plaintiff's medical privileges were suspended with eligibility to reapply in twelve months. Plaintiff subsequently filed an action in district court against the hospital for breach of the covenant of good faith and fair dealing, as well as breach of contract.

The hospital's motion to dismiss was granted by the trial court, which ruled that the hospital's procedures were followed and that the decision was reasonable.

On appeal, the Nevada Supreme Court upheld the dismissal. The court held that the district court had the right to review decisions made by private hospital review boards, the peer review committee adequately reviewed the evidence, and the committee acted with reasonable belief that suspension was warranted. Plaintiff failed to overcome the presumption that the review committee acted with reasonable belief and that the suspension was warranted based on the evidence. Therefore, the hospital was entitled to immunity under the Health Care Quality Improvement Act.

Michel v. Nevada
17 P.3d 1003 (Nev. 2001)

Although attorney liens have priority over hospital liens, the entire funds in dispute must first be turned over to the court in an interpleader action in order to determine the rights of such interest parties.

Attorney Herbert L. Michel, Petitioner, filed a personal injury action on behalf of Yolanda B. Cervantes (Real Party in Interest) for which Cervantes agreed to pay forty percent of any amount recovered. Cervantes was awarded \$14,705.00, which was insufficient to pay her \$28,346.26 in medical expenses. Since the medical providers could not agree on a pro-rata share of the arbitration award, Michel deducted his fees, interpleaded the remaining \$8,193.27, and named Cervantes and the medical providers as defendants. The district court refused his subsequent request to be discharged from the interpleader action, and he sought an extraordinary writ from the Nevada Supreme Court, directing the district court to discharge him.

Based on substantial case law, the court determined that an attorney's lien does, in fact, have priority over a medical provider lien when the award is insufficient to pay all liens against the award. The court held that, although there is an important public policy interest served by enforcing medical provider liens, there is no authority that supports giving them priority over attorney liens. Furthermore, Nev. Rev. Stat. 108.600(2) specifically gives attorney liens priority over "hospital liens," which the court likened to medical provider liens. However, although the court determined that the interpleader action is the appropriate procedure to determine the rights of the interested parties, the entire funds in dispute must first be turned over to the court. Once the funds have been submitted, the court must make certain findings and conclusions before the money is distributed. Since Michel failed to submit the entire funds to the court, the court could not make these findings and, therefore, Michel's writ requesting extraordinary relief was denied.

Mineral County v. Nevada
20 P.3d 800 (Nev. 2001)

Disputes involving various claimants to water rights, including adjacent states, local political subdivisions, and an Indian Reservation, are best settled in federal court when litigation has already commenced there.

Due to the depletion of water levels in Walker Lake, petitioners Mineral County and the Walker Lake Working Group sought writs of prohibition and mandamus to prevent the respondents from granting additional rights to withdraw water from the Walker River system. They also sought to compel the respondents to comply with their obligations to protect Walker Lake.

The Nevada Supreme Court ruled that mandamus and prohibition are extraordinary measures, to be used sparingly and in the court's discretion. The court noted that the United States Supreme Court has ruled that the allocation of water rights is essentially a question of property rights and is best disposed of in unified proceedings. Related litigation on water rights in the Walker River system had already begun in United States District Court. Given that fact, and that there was an action pending in Decree Court, the court ruled that federal district court was the proper place to decide the issues. The court further ruled that the petitioners did not meet the burden of showing that mandamus or prohibition was warranted.

Roll v. Tracor, Inc.

140 F. Supp. 2d 1073 (D. Nev. 2001)

Federal court ruled that, although Nevada had not yet ruled on the issue, Nevada would follow California's approach to successor liability in products liability case.

Roll, an airman at Nellis Air Force Base, was injured when flares unexpectedly exploded. The flares were part of an inventory manufactured by a company that had since been acquired by another. Roll brought suit against the new owner of the defective flares' original manufacturer. Roll was stationed at Nellis at the time of the injury; however, as a member of the military, he maintained his New York residency when he joined the military. He brought the action in the Western District of New York. It was then transferred to Nevada for the convenience of the parties.

The dispute centered on what liability, if any, the succeeding company held for products defectively designed by the company originally producing the flares.

The court found that a transferee court in a diversity action must apply the laws of the state in which the action was originally filed. New York courts apply the law of the jurisdiction with the greatest interest in the dispute, and the court found that, in this case, that jurisdiction was Nevada. The court then found that New York law required the court to decide the successor liability issue without regard for the case's other issues.

The federal court attempted to predict how the Nevada Supreme Court would rule on the case. The court based its surmise on the Nevada Supreme Court's decisions in other products liability cases, using similar California cases. Since the Nevada Supreme Court had not previously ruled on the elements of the "mere continuation" exception to successor liability, the court discussed the relationship of the domiciled state of the plaintiff (New York), the primary place of business for the defendant (Texas), and their application to the products liability case.

The federal court reasoned that, since California followed New York's version of successor liability and Nevada has looked to California decisions in

previous (similar) product liability cases, Nevada would probably rule that: the mere continuation exception to successor liability refers to corporate reorganizations where only one corporation remains and the predecessor organizations are extinguished; the successor-buyer is not in existence prior to the purchase of the predecessor's assets; and the predecessor-seller does not survive the sale of the assets. Moreover, if the business of the successor is the same as the business of the predecessor, the business employs the same work force, and the predecessor's officers and directors become the officers and directors of the successor organization, then the mere continuation exception to the successor liability rule will apply.

Stafford v. County of Washoe
2001 U.S. App. LEXIS 3183 (D. Nev. 2001)

Issue preclusion requires federal courts to preclude identical arguments made previously by a party in state court.

The state district court held that the appellants failed to state a claim in a complaint and also denied the appellants' proposed amendment to a complaint. The appellants failed to state a claim because a person cannot bring suit against a political subdivision of Nevada. An amendment to a complaint to add a plaintiff that is barred by the statute of limitations would be useless. The same appellants raised these identical issues in federal court, claiming that the district court erred in its decision. The court held that the appellants are subject to issue preclusion where identical issues are raised in the federal court that have already been decided in state court. Issue preclusion requires federal courts to respect state court rulings.

Vega v. E. Courtyard Assocs.
24 P.3d 219 (Nev. 2001)

Violation of a properly adopted building code is negligence per se if the plaintiff belongs to the class of persons the code was intended to protect and the injury suffered is the type the adopted code was intended to prevent.

Ms. Vega was injured as she attempted to negotiate a ramp to the main entrance of the Eastern Courtyard medical facility. Vega charged negligence per se because the slope of the ramp exceeded the slope allowed under the Uniform Building Code (UBC). The district court rejected the claim because Vega only alleged violation of an ordinance, not a statute. Ms. Vega appealed the district court's failure to instruct the jury on the negligence per se doctrine as it related to her case.

The Nevada Supreme Court reversed and remanded the case to the district court. The court concluded that the district court must determine as a matter of law whether a particular statute, administrative regulation, or local ordinance is utilized to define the standard of care in a negligence action. The court held that violation of a statute constitutes negligence per se when the injured party is part of the class of persons the statute was intended to protect and the injury suffered is the type that was intended to be prevented. In so ruling, the court reversed its holding in *Ashwood v. Clark County*, 930 P.2d 740 (Nev. 1997), which concluded that violation of the UBC may be used to establish negligence per se.

Chief Justice Maupin dissented. He argued that a jury should be allowed to hear evidence of a building code violation when considering negligence, but that the lack of uniform application of building codes made a negligence per se finding improper.

CONSTITUTIONAL LAW

Fallon Paiute-Shoshone Tribes v. City of Fallon **174 F. Supp. 2d 1088 (D. Nev. 2001)**

Motion for summary judgment on numerous federal statutory and constitutional provisions concerning tribal land issues granted in part and denied in part.

The Fallon Paiute-Shoshone Tribe acquired property which was transferred to the United States in trust as part of its reservation, pursuant to section 103 of Public Law 101-618. The property is located within the City of Fallon, which operates the only publicly-owned sewer treatment facility in the area and also provides electrical service. The Tribe requested services from the City, which the City denied. The Tribe filed an action seeking utilities service and alleging multiple statutory and constitutional violations, and moved for summary judgment on each violation.

The Tribe argued that the City's denial of services violated 42 U.S.C. § 1983, which creates a cause of action for rights conferred by federal statutory and constitutional provisions. The Tribe also claimed a violation of the equal protection clause, alleging that the City did not similarly require that other landowners have their land annexed to the City before utilities service would be provided. The Tribe also asserted substantive due process and takings clause claims.

The district court held that the federal government assumed a guardian-ward relationship with respect to tribal Indians and must protect trust property from state interference. Because the United States was required to accept the land into trust under § 103, the Tribe has a federal right to have its land held in trust and the City's denial of services interfered with the Tribes' right to enjoy the beneficial use of such land. Plaintiff's motion for summary judgment on § 1983 was therefore granted.

Because the City failed to provide any evidence refuting the allegations that it treated similarly situated parties differently from the Tribe, summary judgment was granted on the equal protection claim. Summary judgment was denied on the substantive due process claim, because the Tribe failed to specifically identify their substantive right and because of the highly destructive potential of overextending substantive due process protection. The Tribe's motion for summary judgment on its takings clause claim was also denied because it failed to provide sufficient evidence that the refusal of service amounted to anything more than a diminution of value. The court found that issues of material fact remained regarding the details of the contract between the Tribe and the City, and thus denied summary judgment on the breach of contract claim.

Henkle v. Gregory
150 F. Supp. 2d 1067 (D. Nev. 2001)

Although § 1983 claims are totally subsumed under Title IX, a gay student could bring a claim against school administrators under the First Amendment's protections of free speech and could seek punitive damages from the officials in their individual capacities.

Plaintiff was an openly gay high-school student. After his appearance on a television show announcing his sexual orientation, he claimed to experience harassment from other students at his school, and alleged the administration failed to intervene. Plaintiff was twice transferred by school administration to new schools and told not to inform his new classmates about his sexual orientation, but continued to suffer harassment. Plaintiff was eventually placed in an adult education program, in which he could not receive a high school diploma. Plaintiff sued under 42 U.S.C. § 1983 and Title IX, alleging school administrators violated his rights under the First and Fourteenth Amendments.

The Ninth Circuit found that a cause of action may not be brought under § 1983 when another statute provides a comprehensive remedial scheme for the alleged wrong. The court found Title IX to be sufficiently comprehensive and remedial to disallow a § 1983 claim against school officials. Title IX provides for hearings and judicial review. Although the circuit courts were split as to whether Title IX subsumed a § 1983 claim, the court held it would be inconsistent to allow a plaintiff to circumvent Title IX's remedial scheme by bringing a § 1983 action.

The court found that students do not leave all constitutional rights at the schoolhouse door, and the right to free speech should not be unduly restrained. The school officials' attempts to suppress the plaintiff's speech regarding his sexual orientation were sufficient to permit the plaintiff to withstand the motion to dismiss. Further, the plaintiff presented a sufficient claim of retaliation based on his First Amendment rights to refute a motion to dismiss for failure to state a claim.

The court held that school officials were not entitled to qualified immunity. The Supreme Court has clearly established a student's First Amendment right to freedom of speech and expression. The officials should have known that students are entitled to free speech, and thus were precluded from arguing qualified immunity. Additionally, the court found the plaintiff could seek punitive damages against the officials in their individual capacities, but not in their official capacities.

The court granted defendant's motion to dismiss based on the § 1983 actions and claims for punitive damages against the officials in their official capacities. However, the court denied the motions to dismiss on the First Amendment and Title IX claims.

Mangarella v. Nevada
17 P.3d 989 (Nev. 2001)

A statute that imposes mandatory probation conditions on convicted sexual offenders and is limited in specific questions asked does not violate protection against self-incrimination and is not unconstitutionally vague.

Defendant pleaded guilty to two counts of lewdness with a minor and was sentenced to serve 36 to 120 months in prison. The sentence was suspended and defendant was placed on a five year probation, with conditions required by Nev. Rev. Stat. 176A.410. Defendant challenged the constitutionality of the statute, arguing that the polygraph provision was overbroad, requiring defendant to submit to polygraph examinations violated his Fifth Amendment privilege against self-incrimination, and the statute was vague in its failure to specify guidelines for what constitutes acceptable employment, curfews, or residences.

The Nevada Supreme Court held that the statute was not vague because it required the scope of the polygraph examination to be limited to questions related to defendant's drug use. The court wrote that the statute required the supervising probation officer to set requirements that are reasonably related to the purpose of the statute and that the statute did not give the probation officer the discretion to impose conditions that were arbitrary, capricious, or discriminatory. The court also held that compelling a probationer to answer questions in a polygraph examination as a condition of probation did not violate the Fifth Amendment because it was not a waiver of the privilege against self-incrimination.

Nevada v. Harvey
32 P.3d 1263 (Nev. 2001)

The Clerk of Court is a ministerial office, and its duties may be performed by the district court

Washoe County Clerk Harvey brought suit against the Second Judicial District Court, asserted that she was the sole person designated by the Nevada Constitution as responsible for performing the duties associated with the court clerk, and that the court had usurped her position as ex officio court clerk. The district court argued that the office of clerk is a ministerial function of the judicial branch and, as such, the district court was entitled to supervise, control, or operate the office of district court clerk.

The Nevada Supreme Court held that the district court had not usurped Harvey's authority, and dismissed the complaint. The office of the district court clerk is not a constitutional office, but rather a ministerial office inherent to the judicial branch of government. The court specified that the office's sole purpose is to perform clerical and record-keeping functions necessary to the district court's operation. The clerk's duties may be performed, in whole or in part, either by the county clerk pursuant to legislative enactment, or by the district court pursuant to court rule.

Justice Leavitt, joined by Justice Young, dissented. Justice Leavitt wrote that only the Nevada legislature can change the duties of the office of County Clerk. Because the legislature had named the County Clerk as the Clerk of the Court, and counties are legislative subdivisions of the state that derive their authority from the state, the majority was in error in specifying the Clerk's duties and who may fulfill them.

Nev. Mining Ass'n v. Erodes
26 P.3d 753 (Nev. 2001)

For purposes of the Nevada constitutional deadline for legislative adjournment, midnight Pacific Standard Time is not the same as midnight Pacific Daylight Savings Time.

During the 71st session of the Nevada Legislature, Assembly Bill 661 was returned to the Assembly, in a form which concurred with the Senate's three amendments after 12:00 a.m. Pacific Daylight Savings Time (PDST), but before 12:00 a.m. Pacific Standard Time (PST) on June 5, 2001. In addition, Assembly Bill 94 Conference Committee Report was similarly adopted by the Senate after midnight PDST but before midnight PST on June 5, 2001. Thereafter, the state legislative counsel declined to enroll both bills and refused to deliver the bills to the Governor for his action. In response, the plaintiffs, a non-profit mining association and a non-profit association of counties, petitioned the court for a writ of mandamus to compel the defendant, a public officer, to perform the legal duty of her office.

In order to determine the issue, the Nevada Supreme Court was asked to resolve whether the 120-day durational limit included the first day of regular session and whether midnight Pacific standard time is the same as midnight Pacific Daylight Savings Time. Giving effect to the intent of those who enacted the durational limit, the court determined that the durational limit constitutionally mandated under Nevada Constitution, art 4, § 2(2) restricted the regular sessions to no more than 120 days. Therefore, this 120-day regular session limit had to include the first day in the tally.

Secondly, the court defined the difference between the terms "Pacific Standard Time" and "Pacific Daylight Savings Time." By looking to the commonly understood meanings, as well as the historical development of the terms, the court determined that these terms were clearly different and distinct, Pacific Standard Time being one hour earlier than Pacific Daylight Savings Time.

Taking this into consideration, the Supreme Court converted the 120-day durational limit into hours, hence establishing that the legislature had 2,880 hours before it must adjourn. Consequently, when Nevada changed its clocks in April, the day was shortened to twenty-three hours. By tacking these twenty-three hours on to the adjournment date, the last available hour for regular session would occur at 1:00 a.m. on June 5, 2001.

In light of this conclusion, Assembly Bills 94 and 661 were passed during the regular session of the 71st session of the Nevada Legislature. The Supreme Court granted the petitions and required the defendant, under her constitutional and statutory duty, to enroll the bills and deliver them to the governor.

Nylund v. Carson City
34 P.3d 578 (Nev. 2001)

The emergency management immunity statute shields a city from liability for pre-emergency negligence that contributes to damage caused by later emergency management activities, and the city could declare the emergency and need not wait for the governor's formal emergency determination to claim immunity.

Heavy rains and melting snow created a flood in Carson City, which caused the city's storm drainage system to overflow. The city declared the situation an emergency disaster, and employees diverted water down Fifth Street by employing sandbags. This flooded the Nylund's condominium, causing serious damage. The Nylunds sued the city, their homeowners' association, and the Fraternal Order of the Eagles, claiming trespass, nuisance, wrongful channeling of waters, and negligence against plaintiffs. Carson City moved for summary judgment, claiming statutory immunity. The city produced affidavits, indicating that the city had declared the flood an emergency. Plaintiffs opposed the motion and requested more time for discovery. Plaintiffs alleged that the city had notice as early as 1983 that the storm drainage had design and maintenance defects, and the city should be held liable.

The court denied plaintiffs' request for additional discovery and granted Carson City's motion for summary judgment, claiming there was no issue of material fact due to the city's immunity. On appeal, plaintiffs alleged that the district court misapplied the emergency management immunity statute by failing to distinguish pre-flood activities, such as design, operation, and maintenance of storm drains, from handling the flood.

The Nevada Supreme Court held that the district court properly read and applied the law and summary judgment was appropriate. The court stated that the immunity statute covered both negligent emergency management activities and previous negligence that contributed to the damage caused by the emergency management activities. The court also held that Carson City was allowed to declare an emergency itself, in accordance with its municipal code, and thereby claim immunity under Nev. Rev. Stat. 414.110.

In dissent, Justice Rose stated that the purpose of the emergency management immunity statute was to grant protection to those who were taking immediate action in a crisis situation. He alleged that the majority gave the immunity statute an expansive interpretation not justified by the statute itself. He also argued that the emergency management statute specifically required an emergency called by the Governor; and since the Governor had not done so, the immunity statute was inapposite.

Perrin v. Gentner

177 F. Supp. 2d 1115 (D. Nev. 2001)

Municipal governments are not immune from suit for state law claims arising out of operational tasks.

The court reviewed defendants' motion for summary judgment arising out of a shooting incident between a Las Vegas Metropolitan police officer and a pedestrian shot and killed by the officer. Prior to the shooting, the officer ordered the pedestrian to show his hands, but never warned him that he would use deadly force. The officer subsequently fired several rounds, hitting the pedestrian more than once, stopped, and fired again when the pedestrian turned towards the officer. The officer then reloaded his weapon and radioed for help. At least six of the fourteen rounds fired hit the pedestrian, resulting in his death. The only object retrieved from a subsequent search of the victim was a glass jar.

The decedent's estate filed private rights of action against the officer and municipality for violations of the decedent's Fourth and Fourteenth Amendment rights. The estate also brought suit against defendants for violations of state law claims based on wrongful death, negligent hiring, negligent supervision, and negligent retention. All issues were subsequently disposed of except those related to negligent training, negligent supervision, and wrongful death.

Nev. Rev. Stat. 41.032(2) states that a legal action may not be brought against a state, or an officer of the state, based upon the performance or failure to perform a discretionary function, whether or not the discretion involved is abused. The question of governmental immunity depends upon whether the actions of the officer were discretionary or ministerial in nature. The district court relied on *Lewis v. St. Petersburg*, 260 F.3d 1260 (11th Cir. 2001), in which the court found that "when an officer has made an initial discretionary decision to conduct a stop and then proceeds to carry out that decision, the officer is no longer exercising a 'discretionary' function, but is engaged in an 'operational' task." Accordingly, the officer could be held liable for negligence in the use of deadly force. Applying the Eleventh Circuit's rationale to the facts of this case, the district court found that the officer's use of deadly force in furtherance of the discretionary stop was an operational task pursuant to the police department's profiling policy, which could subject the municipality to liability.

In determining the municipality's liability based upon negligent training and supervision, the court looked to Nevada case law, as stated in *State v. Webster*, 504 P.2d 1316, 1319 (Nev. 1972). The *Webster* court held that subsequent retention and supervision are "the type of operational functions of government not exempt from liability if due care has not been exercised and an injury results." Because the police department assumed the obligation to ensure that the officer's employment did not pose an unreasonable safety risk to those he stopped, the department's training and supervision constituted an "operational function" for which they do not enjoy immunity under Nev. Rev. Stat. 41.032.

Reinkemeyer v. Safeco Ins. Co. of Am.
16 P.3d 1069 (Nev. 2001)

Nevada statutory law prohibits cancellation or non-renewal of homeowner's insurance, and such law is facially constitutional under the United States and Nevada Constitutions.

Dr. and Mrs. Reinkemeyer were insured by Safeco Insurance Company of America under a homeowners' insurance policy. Between 1989 and 1993, the Reinkemeyers submitted three claims under the policy, totaling over \$200,000. Although the losses were not the fault of the Reinkemeyers, Safeco declined to renew their policy in 1994.

The Reinkemeyers sued Safeco in federal district court for failing to renew the homeowner's policy, claiming Safeco violated Nev. Rev. Stat. 687B.385. Safeco argued that the statute only applied to automobile insurance, not homeowner's policies. Both sides based their arguments on the Nevada Legislature's intent when it amended Nev. Rev. Stat. 687B.385 in 1997.

The United States District Court of Nevada certified two questions concerning the legislation to the Nevada Supreme Court: (1) whether former Nev. Rev. Stat. 687B.385 prohibited cancellation or non-renewal of certain homeowners policies; and (2) whether, as the statute applied to homeowner's policies, it violated the United States and Nevada Constitutions.

Relying on the plain language of the statute which stated that the statute applies to casualty and property insurance, the Nevada Supreme Court held that the pre-1997 version of the statute applied to homeowner's insurance policies. The court also held that the statute was not facially unconstitutional under the Nevada Constitution because the statute did not require that every individual policy guarantee a fair rate of return.

CONTRACTS

Sunrise Suites, Inc. v. Eric Nelson Auctioneering **266 B.R. 895 (D. Nev. 2001)**

Oral modification of a contract under a confirmation order from the bankruptcy court is a violation of the bankruptcy court's registration requirements.

Attorney Harry M. Weiss, Appellant, agreed to represent Carl Icahn at an auction to bid on the Sunrise Suites Hotel & Casino and RV Park (Properties). The bankruptcy court had previously entered a confirmation order stating that Eric Nelson Auctioneering (Nelson) would offer a one percent commission to Weiss as buyer's broker if he followed certain requirements. Weiss did not comply with the requirements, and Nelson subsequently refused to pay the broker's fee. Weiss filed a complaint in bankruptcy court, but the court granted Nelson's motion for summary judgment. The district court affirmed the bankruptcy court's holding.

In affirming, the court determined that, in order to form a contract, Weiss had to affirmatively accept the terms of Nelson's offer but failed to do so because he did not fulfill the written commission requirements. Furthermore, the contract could not be orally modified, as Weiss contended, as that would have constituted a violation of the bankruptcy court's registration requirements. Further, Nelson did not owe a fiduciary duty to Weiss because he was neither the buyer nor the seller.

Kaldi v. Farmers Ins. Exch. **21 P.3d 16 (Nev. 2001)**

A wrongful termination claim involving an exclusive agency agreement was unsuccessful because it did not contain a "for cause provision."

Kaldi entered into an agent agreement with Farmers Insurance in February 1981. The agreement authorized Kaldi to sell Farmer's insurance in an area determined by Kaldi. He was to be allowed to submit requests for other insurance companies, but only if it was in an area for which Farmers' did not provide coverage. Also contained in the contract was a provision that allowed for termination of the agreement by either party upon written notice three months in advance. Upon receiving this written termination letter, an agent could request a review of the termination within ten days and receive a judgement by

the Termination Review Board. Kaldi construed this provision – allowing for a review of the termination – as a covenant that the employee relationship would not be terminated without just cause. Kaldi subsequently brought suit against Farmers, alleging wrongful termination of their agent appointment agreement, that Kaldi retained the right to all information on his customers (under trade secrets), that the contract actually created an employer-employee relationship, not one of an independent contractor, and that there was a breach of an implied covenant of good faith and fair dealing. The district court ruled in favor of Farmers, dismissing Kaldi's claims. Kaldi appealed.

The Nevada Supreme Court affirmed the lower court decision. The court held that the contract unambiguously identified Kaldi as an independent contractor, not an employee, and that, absent a contractual provision to the contrary, an independent contractor/principal agency relationship is terminable at any time at the will of the principal or the agent. Furthermore, Nev. Rev. Stat. 683A.290(1) allows for the termination of an agent's appointment at any time.

The court also rejected Kaldi's claims that he was entitled to retain all information supplied by his customers as trade secrets. The court stated that the elements needed for a finding of misappropriation of trade secrets are: 1) a valuable trade secret; 2) misappropriation of the trade secret through use, disclosure, or nondisclosure of use of the trade secret; and 3) the requirement that the misappropriation be wrongful because it was made in breach of an express or implied contract or by a party with a duty not to disclose. Because all documents and records are the confidential property of the company, and the contract clearly states that the customer's information is the property of Farmers, Kaldi's argument failed. Furthermore, Kaldi's assertion that if the agreement is breached by the company, he is not bound by the provision, also fails because the court already determined that Farmer's was within its rights to terminate Kaldi with thirty days notice.

Schwartz v. Wassenburger
30 P.3d 1114 (Nev. 2001)

In cases of anticipatory breach, the statutory period commences either on the date stipulated for actual performance or on the date that the action is initiated.

Appellant Schwartz sued on behalf of her late husband's estate, arguing that respondents breached a purchase agreement entered into by her husband before his death. The district court dismissed the action as beyond the six year statutory time limit mandated in Nev. Rev. Stat. 11.190(1)(b), with the statute being triggered at the moment the defendants allegedly repudiated the contract. Schwartz appealed, arguing that the trigger date was not correct.

The Nevada Supreme Court held that, in cases of anticipatory breach, the statutory period commences either on the date stipulated for actual performance or, if the aggrieved party chooses to bring suit before performance is due, on the date that the action is initiated. Because appellant's husband filed the complaint before performance under the contract was due, and six years had not yet lapsed from the initial filing of appellant's suit, the statute of limitations had not yet run, and the suit was proper.

Sec'y of State v. Tretiak
22 P.3d 1134 (Nev. 2001)

A claim of statutory securities fraud under Nev. Rev. Stat. 90.570 does not require the common law elements of reliance and scienter.

Tretiak, founder and CEO of a small corporation, made a public offering that the Securities Division of the Nevada Secretary of State (Division) found to have involved numerous misrepresentations and securities violations. The Division imposed sanctions based on an interpretation of Nev. Rev. Stat. 90.570 that did not require the common law elements of reliance and scienter for a claim of securities fraud. On appeal, the state district court upheld the Division's findings of fact but found that the Division had abused its discretion in imposing sanctions. The Division appealed and Tretiak cross-appealed, arguing that the findings of fact should have been set aside.

The Nevada Supreme Court found that there was substantial evidence to support the Division's findings of fact, and held that the sanctions imposed were not unreasonable. The court overruled the district court and re-imposed the sanctions.

The court also denied Tretiak's cross-appeal. The court held that scienter and fraud are not required to establish a claim of securities fraud under Nev. Rev. Stat. 90.570. In arriving at that conclusion, the court relied on both case law from other states and from the United States Supreme Court decision in *Aaron v. Securities & Exchange Commission*, 446 U.S. 680 (1980), interpreting the federal statute that parallels Nev. Rev. Stat. 90.570. That holding focused on the effect of the conduct in question on members of the investing public rather than upon the culpability of the defendant.

CRIMINAL LAW

Barton v. Nevada
30 P.3d 1103 (Nev. 2001)

Nevada statute, defining manslaughter, is not unconstitutionally vague or ambiguous.

Barton was involved in a road rage incident, in which Barton intentionally rammed another car, killing the driver. Barton was subsequently convicted of second-degree murder in a jury trial, and sentenced to life in prison. Barton filed a post-conviction petition for habeas, arguing: 1) ineffective assistance of trial counsel for failing to request a jury instruction on the lesser charge of reckless driving causing substantial bodily harm; and 2) ineffective assistance of appellate counsel for failing to argue effectively that Nev. Rev. Stat. 200.070, which defines involuntary manslaughter, is unconstitutionally vague and ambiguous. The district court denied the petition, and Barton appealed.

The Nevada Supreme Court affirmed the district court's denial, holding that, under the traditional elements analysis, reckless driving is not a lesser offense for murder. Further, the court noted that Barton was not entitled to a lesser offense instruction regarding reckless driving because the charged offense of murder could have been committed without committing reckless driving. The court therefore ruled that trial counsel was not ineffective for

failing to request the instruction. The court also held that Nev. Rev. Stat. 200.070 adequately defines murder and manslaughter, and that appellate counsel was not ineffective in arguing that the statute is unconstitutionally vague and ambiguous.

Chapman v. Nevada
16 P.3d 432 (Nev. 2001)

Denial of sexual assault defendant's request for separate psychological examination of the child victim held to be within trial court's discretion where family and clinical interviewer gave corroborating evidence and defendant did not establish a reason to doubt the victim's veracity.

Appellant, Chapman, was convicted on numerous counts of sexual assault of a minor. Chapman appealed his conviction, asserting the district court should have granted his motion for an examination by an independent psychologist. He also charged that the trial court improperly excluded evidence and improperly discounted a failure by the state to preserve evidence, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The court denied these claims and upheld Chapman's conviction.

The court found that Chapman had failed to show a compelling need for separate examination since: 1) the state's forensic interviewer did not qualify as an expert; 2) the testimony of the family corroborated the charges; and 3) the evidence did not establish a reason to suppose that the victim's mental or emotional state may have affected her veracity.

Additionally, the court held that the trial court did not err in excluding Chapman's evidence of the victim's knowledge of sexual activity and the male anatomy, since the evidence did not prove that the victim could have fabricated the charges against Chapman. Regarding Chapman's third charge, the court noted that the state never had possession of the evidence Chapman accused it of failing to preserve.

Evans v. Nevada
28 P.3d 498 (Nev. 2001)

Jurors may not prematurely rely on "other matter" evidence to find or give weight to aggravating factors.

Evans, defendant in a murder trial, was convicted and sentenced to death. The district court denied defendant's post-conviction petition for habeas corpus, upon which he filed an appeal. In the appeal, Evans contended that his trial and appellate counsel were ineffective on several counts. The Nevada Supreme Court rejected some of the arguments outright and held that, although counsel was ineffective, Evans failed to establish prejudice.

However, the court found that Evans's claim that counsel was ineffective for failing to object to the prosecutor's comments during the penalty phase of the proceeding did have merit. Evans argued that the prosecution made an improper argument to which defense counsel failed to object. The state argued that the prosecutor was merely amending a statement of defense counsel, wherein defense counsel told the jurors that they could not consider the "other matter" evidence introduced by the prosecution unless they first found an aggravating circumstance. The court ruled that, although defense counsel's

argument was incomplete because she misinformed the jurors regarding what evidence they could consider, the jurors could have considered other evidence introduced if they decided the death sentence was not appropriate. However, the prosecutor's argument erroneously directed the jury to consider other evidence in its determination of death penalty eligibility.

Consequently, Evans's penalty phase was unduly prejudiced because the jurors relied prematurely on "other matter" evidence in its consideration of enumerated aggravating circumstances.

The court upheld the conviction but vacated Evans's death sentence and remanded the case for a new penalty hearing. It also provided that, in future capital cases, jurors shall consider evidence relevant to the existence of: 1) aggravating and 2) mitigating circumstances, as well as 3) other evidence presented against the defendant. In determining whether any aggravated circumstance has been proven beyond a reasonable doubt, the jury is to only consider evidence relevant to that aggravating circumstance. The same standard applies to mitigating circumstances that outweigh any aggravating circumstances, although that determination is made on an individual basis.

After a unanimous finding beyond a reasonable doubt that at least one aggravating circumstance exists, and after each juror has determined that any mitigating circumstances do not outweigh the aggravating circumstances, the defendant is eligible for the death penalty. At that point, the jury is to consider all three types of evidence. It still has the discretion to impose a lesser sentence than that of death, and the decision must be unanimous.

Chief Justice Maupin with whom Justice Leavitt joined, dissented in part, finding that Evans's petition for post-conviction relief should have been denied in its entirety. The prosecution's attempt to correct defense counsel's misstatement was appropriate. Further, the prosecutor's statement was "related to a separate defense argument regarding other penalties and did not unequivocally address the requirements for imposition of the death penalty." Finally, the dissent suggested that any error was harmless, noting how carefully the trial was conducted, that Evans confessed to murder, and a competent witness described the murder.

Finger v. Nevada
27 P.3d 66 (Nev. 2001)

Act of the 1995 Nevada Legislature eliminating insanity as an affirmative defense is unconstitutional and, therefore, the M'Naghten approach to insanity controls.

On April 10, 1996, Fredrick Finger was arrested for murdering his mother. Upon being questioned by the police, Finger gave two disparate versions of the events. Finger first claimed that his mother's roommate killed his mother; however, Finger failed to explain the blood on his clothes or his possession of the murder weapon. Finger then admitted to stabbing his mother, but claimed he killed her before she could carry out a plot to kill him. Finger subsequently filed a motion to enter a plea of not guilty by reason of insanity. However, Finger's defense counsel believed that, due to 1995 Nevada legislation, Finger would be prohibited from arguing for acquittal on the grounds of legal insanity.

As a result, Finger's motion to enter a plea of insanity was never argued, and the district court never ruled on the motion.

At arraignment, Finger requested permission to enter a plea of not guilty by reason of insanity. The state objected to the request, and the district court denied the request without explanation. Finger then declined to enter a plea, and the court entered a plea of not guilty. Based on the denial of the request to enter an insanity plea and Finger's inability to raise insanity as an affirmative defense, Finger determined there were no issues to be resolved at trial. He entered a plea of guilty but mentally ill. He was convicted of second-degree murder, and subsequently appealed on the constitutional issues relating to legal insanity.

Finger argued that the accused have a fundamental right to pursue a defense of legal insanity under the due process clauses of the United States and Nevada Constitutions. Finger argued that Senate Bill 314 (SB 314), a bill enacted by the 1995 Nevada Legislature that abolished the "not guilty by reason of insanity" plea and created the "guilty but mentally ill" plea, was unconstitutional. Under SB 314, an individual pleading guilty but mentally ill is subject to the same punishment as someone entering a guilty plea, with the exception that the district court may suggest certain types of treatment for the convicted individual. Insanity status is unclear and found only in Nev. Rev. Stat. 193.220, which generally provides no lesser degree of criminality because of the defendant's mental condition. However, the finder of fact may consider insanity when determining purpose, motive, or intent as a necessary element of a crime. Finger argued that Nev. Rev. Stat. 193.220, together with the elimination of insanity as an affirmative defense, permits persons to be convicted even though they do not possess the mental ability to form the criminal intent (a required element of the crime), and that this violates the due process clauses of the United States and Nevada Constitutions.

On appeal, the Nevada Supreme Court reasoned that society historically viewed the insane as incapable of determining when their conduct violates legal or moral standards; as a result, society has found that such individuals are not criminally culpable for their actions. The court noted that criminal intent, or mens rea, is a mental element of every crime, and that a legally insane person cannot possess the necessary mens rea. The *M'Naghten* standard for determining legal insanity is available only where the defendant's mental state is such that: (1) the defendant does not have the ability to understand what he is doing; or (2) the defendant does not have the ability to appreciate that his actions are illegal. Non-descript mental health problems do not necessarily meet this test's strict guideline. While some states have adopted the *Durham* standard, which is more expansive in its definition of insanity, others have adopted the *M'Naghten* standard, and yet others have adopted a compromise that lies in between the two approaches to insanity.

Before SB 314, Nevada courts applied the *M'Naghten* rule and considered insanity to be an affirmative defense. If found not guilty by reason of insanity, a defendant would be immediately committed to a mental health facility, and would be released only if a judge determined the individual to be no longer mentally ill. After SB 314, an accused could not argue for acquittal based on legal insanity, but could only argue that the state has not proven intent beyond a

reasonable doubt. If a jury acquitted because it concluded the defendant lacked the mental capacity to form intent, the defendant was no longer immediately committed to a mental health facility, and could be held only under the provisions of the civil involuntary commitment statutes.

The court reasoned that criminal intent is a fundamental aspect of criminal law. By association, the court determined that the concept of legal insanity is also a fundamental principle, and as such, due process protects the concept of legal insanity. As a result, the court held that the legislature may not abolish insanity as a complete defense and declared the provisions of SB 314 to be unconstitutional.

The court held that the *M'Naghten* rule applies in Nevada. To qualify to be legally insane, the court requires that a defendant be: 1) delusional to the extent that the defendant did not know or understand the nature and capacity of the criminal act; or 2) the delusion is such that the defendant could not appreciate the illegality of the criminal act. Under the court's opinion, legal insanity now has a precise and narrow definition in Nevada law. The court ruled that, while lay witnesses may testify about the defendant's actions, they cannot use the word "insane" to describe those actions. In so ruling, the court expressly overruled *Aldana v. State*, 720 P.2d 1217 (Nev. 1986), to the extent it implies that any mention of mental illness requires the court to instruct the jury on the issue of legal insanity.

Justice Leavitt concurred in the judgment, writing that requiring a mentally ill defendant to plead guilty but mentally ill deprives that defendant of liberty without due process, tramples on the due process rights of mentally ill defendants, and is unconstitutional. Moreover, Justice Leavitt noted that the former reading conflicted with several statutes. The procedure made mental illness a crime by confining a person who cannot form the required criminal intent and is only mentally ill. Justice Leavitt argued that this is cruel and unusual punishment and, as such, in violation of the Eighth Amendment of the United States Constitution.

Justices Shearing, Maupin, and Chief Justice Rose dissented, arguing that Finger voluntarily pled guilty but mentally insane. The dissent claimed that the Nevada law did not violate due process rights because it still considered the mental state. Moreover, nothing requires the state to provide a not guilty by reason of insanity plea.

Garcia v. Sixth Judicial Dist. Ct.
30 P.3d 1110 (Nev. 2001)

Statute restricting sale of alcohol to minors does not require establishment to ask for identification prior to sale of alcohol.

The Pershing County Sheriff's department conducted a sting operation, attempting to crack down on illegal alcohol sales to minors. The department enlisted the help of a twenty year-old individual (subject) to attempt to make purchases. Petitioners were five individuals who sold alcohol to the subject and were subsequently convicted under Nev. Rev. Stat. 202.055 in township court for selling alcohol to minors. The petitioners were charged with failing to verify age or ask for identification prior to selling alcohol to the subject. However, the subject appeared to be twenty-four to twenty-seven years old. The

petitioners appealed to district court, arguing that they must knowingly sell to a minor in order to violate the statute. The district court affirmed the township court's convictions, and petitioners filed a writ of certiorari to the Nevada Supreme Court.

The Nevada Supreme Court reversed, holding that the lower courts improperly interpreted the word "knowingly" in Nev. Rev. Stat. 202.055 to require the proprietor of the establishment to ensure the individual was over twenty-one by identification alone. Nev. Rev. Stat. 202.055 does not require an establishment to ask for identification before selling alcohol unless the proprietor knows or reasonably should have known the individual was under twenty-one.

Gallego v. Nevada
23 P.3d 227 (Nev. 2001)

Defendant was not denied Sixth Amendment right of self-representation where his disruptive behavior during court proceedings precludes dismissal of court-appointed defense attorney.

Gallego and an accomplice lured two girls into their van, then proceeded to molest and murder them. Their bodies were found in a remote canyon in northern Nevada. The jury found Gallego guilty and sentenced him to death. The death sentence was affirmed in a second penalty hearing fifteen years later. Gallego subsequently appealed, contending that he should have been allowed to represent himself at the second penalty hearing and should have been allowed to substitute counsel during that hearing.

The Nevada Supreme Court affirmed the denial of Gallego's motion for new counsel, holding a request for new counsel will only be granted to an indigent defendant when good cause can be shown. Gallego failed to prove good cause existed merely because he disagreed with the defense strategy of his public defender. The court noted that the strategy was perfectly reasonable and that Gallego's alternate strategies would have been largely impermissible under the rules of evidence.

The court stated that a defendant usually has a Sixth Amendment right to represent himself, but that the right may be denied if the request is untimely, if the request is equivocal, or if the defendant's behavior disrupts the court proceedings. The right may also be voluntarily waived.

The court held Gallego's request to represent himself was timely because it came almost one year prior to the empanelling of the second jury. No delay occurred, and the request did not necessitate a continuance. Similarly, the court found he did not waive his right merely because he used counsel at the original trial, including the first penalty phase. The court rejected the lower court's determination that Gallego's decisions at his first trial could have any application now, fifteen years later.

The court also found Gallego's request could have been unequivocal. At trial, Gallego expressed a desire both to represent himself and to change counsel. The lower court held that the latter request made the former request equivocal. The Nevada Supreme Court rejected that argument, however, because the essence of both requests revolved around the same desire: to cease his relationship with his current public defender. If the request for new counsel was

denied, then Gallego had the right to proceed in his motion to represent himself. The court did not find this error to warrant relief.

However, the court ruled that Gallego's behavior supported the lower court's decision to deny his motion for self-representation. When requesting self representation, a defendant's behavior, even pre-trial, must evidence his "ab[ility] and willing[ness] to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984). Gallego had repeatedly pretended that he could not hear in the courtroom, often turned his back to the court, refused to participate in a conference call, and refused to stop claiming his innocence after the trial judge informed him that such proclamations were inappropriate during a penalty hearing.

Garcia v. Nevada
17 P.3d 994 (Nev. 2001)

Order of conviction affirmed, and order denying a motion to suppress affirmed because suppression of evidence is not available for the violation of an individual's rights under the Vienna Convention on Consular Relations.

The police arrested Garcia after an alcohol-related car accident. The police informed Garcia of his *Miranda* rights, but failed to inform him of his rights as a foreign national under the Vienna Convention. Garcia moved to suppress evidence based on this violation. The trial court denied the motion and a jury convicted Garcia of multiple charges related to the accident.

Garcia appealed his conviction, arguing that the police violation warranted suppression and requesting an automatic reversal based on "structural error."

The court, after considering the Ninth Circuit's stance and the majority of federal and state court decisions, concluded a suppression remedy is not available under the Vienna Convention. The court also concluded an automatic reversal of his conviction would be improper, since the violation was not a "structural error."

Grant v. Nevada
24 P.3d 761 (Nev. 2001)

Court upheld conviction of appellant Grant because improperly admitted evidence was harmless, amendment of the charges against him was not prejudicial, use of a peremptory challenge was race-neutral, and the evidence fully supported his conviction.

Therese Wilson had her purse stolen while gambling at the Bellagio Hotel in Las Vegas. She witnessed a man walking away with her purse and was unable to stop him. Wilson subsequently reported the incident to hotel Security Officer Wayne Kimi, who was called to the hotel lobby with Wilson to identify a possible suspect. That suspect was identified as the man that Wilson saw steal the purse, Isaiah Grant, III. Security Officer Raymond Brown joined them in the lobby and confronted Grant. When Brown lifted the suspect's jacket, Wilson's purse was exposed and Brown and Grant began to struggle. Surveillance cameras captured the event on tape and showed one security officer placing an object back into Grant's jacket, although the tape did not reveal whether or not the object fell out of the jacket. The state filed charges against Grant, including grand larceny and possession of a controlled substance.

Officer Brown testified in the security room as to items he found in the jacket. At trial Security Officer Bernardo Figuredo offered testimony as to what he witnessed on the surveillance tape. The day before the trial began, the state moved to admit Brown's testimony because he was unavailable to testify at trial. The trial court granted the motion. Grant was convicted on both counts.

On appeal, Grant challenged the trial court's admission of Brown's previous testimony. Grant also contended on appeal that the trial court should not have amended his charge of grand larceny *sua sponte* from category B to C.

The Supreme Court of Nevada held for Grant, stating that Nev. Rev. Stat. 171.198(6) did not permit the admittance of prior testimony if the state did not act with due diligence or good faith to have Brown appear at trial. Nevertheless, the court held that the error in admitting the testimony was harmless because the other testimony offered was virtually identical to that of Brown. The court also held that the amendment did not prejudice Grant because the amendment did not involve new charges or offenses. Grant was on notice before the amendment that he was subject to the category C felony.

**Hudson v. Warden, Nevada State Prison
22 P.2d 1154 (Nev. 2001)**

DUI plea bargain reversed and remanded for further proceedings because trial judge did not properly canvass defendant and appellate counsel was deemed ineffective for failing to raise the issue of the validity of prior convictions.

Appellant Hudson was at the Burning Man Festival at Black Rock Desert in Nevada. While there, he ingested methamphetamines, heroin, and ecstasy. At approximately 6:45 a.m. on September 2, he drove a vehicle while under the influence, running over two tents, hitting a third tent, and striking a parked vehicle. Three people were seriously injured as they slept. One victim sustained permanent brain damage after Hudson's vehicle ran over his head. Another victim sustained a concussion, scrapes and cuts to her face, and a severed ear lobe. The third victim suffered third degree burns from hot anti-freeze and battery acid that poured over her as she lay trapped under a vehicle tire.

At trial, the prosecution relied on Hudson's pre-sentence report to prove prior convictions. Hudson's attorney unsuccessfully challenged the use of the pre-sentence report to prove past convictions. As a result, Hudson pled guilty to two counts of causing substantial bodily harm while driving under the influence of a controlled substance and one count of possession of a controlled substance. On appeal, Hudson claimed he was not fully informed of the ramifications of the plea bargain and claimed ineffective appellate and trial counsel. On appeal, Hudson's counsel failed to contest the use of the pre-sentence report to prove convictions. The appeal was denied.

Hudson filed a post-conviction petition for writ of habeas corpus. He argued that he did not understand the potential consequences of the plea agreement and, as a result, the enhanced sentence should be set aside. Hudson argued that he was not aware that the possession charge was upgraded from a category E to a category D felony. Due to his prior convictions, the third conviction increased the amount of time Hudson would spend in jail.

The Nevada Supreme Court held that, while Hudson's plea was freely and voluntarily given, the trial judge did not conduct a proper plea canvass before accepting Hudson's guilty pleas. The judge did not discuss the critical third page of the plea bargain, which discussed consecutive sentencing. The consecutive sentence would have increased the maximum time served from twenty to forty years.

The court also held defense counsel ineffective for neglecting to challenge the prosecution's failure to prove Hudson's prior convictions. During trial, the state has the burden of proving the existence of a sentence enhancing prior conviction. The court held that counsel's failure to raise the issue on appeal fell below the objective standard of effective assistance.

Justice Maupin concurred but took the opportunity to press for adoption of a mandatory oral canvass to minimize the uncertainties in the plea bargaining process.

Justice Agosti, joined by Justices Rose and Leavitt, concurred in the result. The concurrence disagreed with the majority's holding that Hudson freely and voluntarily pled guilty. Justice Agosti asserted that a defendant cannot voluntarily plead guilty if the plea is not knowingly made.

Jackson v. Nevada
17 P.3d 998 (Nev. 2001)

A change of appearance jury instruction is proper when the defendant changes appearance prior to a physical line-up.

On August 15, 1998, Jackson entered and robbed a convenience store. The police responded to store clerk Perry's activation of the store alarm. Perry described the robber as a black male with a goatee and beard, approximately five feet ten inches tall and of a medium build. Perry also indicated the robber was carrying a pair of orange-handled scissors in his pocket.

On August 18, 1998, police stopped a pedestrian near the robbed store who matched the description of the robber. The pedestrian was identified as Jackson, and had a pair of orange handled scissors in his pocket. The police took two photographs of Jackson.

Perry picked Jackson out of a photo line-up. Upon Jackson's request, a physical line-up was subsequently conducted. When Jackson appeared for the physical line-up, he had no facial hair and had made other changes to his appearance since Perry viewed the photo line-up. Perry was unable to identify Jackson in the physical line-up.

At trial, the court gave a "change of appearance" instruction to the jury. The instruction allowed the jury to consider an intentional change of appearance as a factor in determining guilt or innocence. On August 17, 1999, the jury found Jackson guilty of burglary and robbery.

Jackson appealed the use of a change of appearance jury instruction and alleged that there was insufficient evidence to support the guilty verdict. Jackson contended that, since he was unaware of the physical line-up, consciousness of guilt could not be inferred. The Nevada Supreme Court held the argument lacked merit because Jackson himself requested the physical line-up, and was told in advance that someone would be looking at his appearance to pick him out of a group. Jackson also contended that the change of appearance

instruction is only proper where a defendant changes his appearance immediately after the crime. The court found the instruction contemplates two instances where the instruction is appropriate: immediately after the crime or after being accused of the crime. The court held that Jackson changed his appearance to avoid identification for an accused crime, the specific concern that the second part of the instruction intended to avoid.

The court held that the jury could reasonably infer from the presented evidence that Jackson was guilty of the crime. The surveillance video showing the robber with orange handled scissors, the proximity of Jackson's arrest to the scene of the crime, and Perry's repeated identification of Jackson as the perpetrator were all reasons for the jury to find guilt. As a result, the district court did not abuse its discretion in submitting the change of appearance instruction to the jury and there was sufficient evidence to support the jury's guilty verdict.

Johnson v. Nevada
17 P.3d 1008 (Nev. 2001)

If a defendant is mentally competent to stand trial, defendant has the absolute right to prohibit defense counsel from interposing an insanity defense.

Johnson shot and killed a man outside of Caesar's Palace. Several witnesses identified Johnson as the killer, and eight surveillance cameras recorded the murder. Johnson was charged with murder, but facts came to light that suggested that Johnson's mental health was questionable. Following a psychiatric evaluation, Johnson was remanded to the state mental health facility at Lakes Crossing for a sanity commission evaluation. At the mental health facility, three psychiatrists found Johnson capable of standing trial. Johnson pleaded not guilty, and Johnson's public defender attempted to argue an insanity defense. Angry with the public defender's efforts, Johnson sought to represent himself pro se; but after an extensive canvass and citing concerns as to Johnson's mental stability, the court appointed the public defender as Johnson's sole counsel. The public defender argued the insanity defense, but Johnson was subsequently convicted of second degree murder with a deadly weapon. Johnson appealed on the grounds of ineffective counsel in that his public defender argued the insanity defense against Johnson's express wishes.

The Nevada Supreme Court held that the public defender's presentation of the insanity defense against Johnson's express objections was per se improper. The accused has the ultimate authority to specify the pleading to be entered, and an attorney may not speak for the accused on that subject without consultation and cannot waive this right over client's objections. The court held that, if a defendant is mentally competent to stand trial, defendant has the absolute right to prohibit defense counsel from interposing an insanity defense.

The court stated that the public defendant's actions were not subject to the harmless error analysis because entering a plea of not guilty by reason of insanity is a structural defect that affects the framework within which the trial proceeds. As a result, the court held the assertion of an insanity defense under the circumstances to constitute reversible error. The court reversed the conviction and remanded for further proceedings.

Nevada v. Weddell
27 P.3d 450 (Nev. 2001)

A private person attempting to make a citizen's arrest of a felon may only use the amount of force reasonable and necessary under the circumstances.

Weddell attempted to make a citizen's arrest of Bustamonte. Weddell believed that Bustamonte had threatened Weddell's daughter and had intentionally struck Weddell's employee, Cole, with a vehicle the previous day. Weddell parked his car behind Bustamonte's vehicle to prevent its departure and ordered Bustamonte, while pointing a gun at him, to place his hands on the hood of the vehicle. Bustamonte turned and ran and Weddell shot at him several times. None of the shots hit Bustamonte. Weddell was subsequently charged with assault with a deadly weapon and discharging a firearm at another. The district court granted Weddell's motion to dismiss the charges, noting that Nevada law permits private persons to arrest a felon even if the felony is committed outside his presence. The district court determined that Bustamonte committed a felony by striking Cole, and that Weddell was attempting to arrest Bustamonte for this felony. The district court also concluded that, as a matter of law, Weddell was not guilty of the charged conduct because an individual may use whatever force is necessary to effect the arrest of a fleeing felon. The state appealed the dismissal.

The Supreme Court of Nevada reversed the district court and remanded the case for trial. The court considered, as a matter of first impression, what amount of force is allowed under Nevada statutory law. Nev. Rev. Stat. 171.126 provides that a private person may arrest another in three situations: 1) when an offense was committed or attempted in the arrestor's presence; 2) when the person committed a felony offense outside the arrestor's presence; and 3) when a felony has in fact been committed and the arrestor has reasonable cause to believe that the person to be arrested has committed it.

The court explained that, historically, the "fleeing felon rule" permitted a private person to use deadly force to apprehend a felon. The rule developed when the punishment for nearly all felonies was death, and the rule was designed to prevent the escape of a felon by inflicting the inevitable punishment. The court noted that, today, many felonies do not involve dangerous conduct and most are not punishable by death. The court reasoned that when the legislature repealed Nevada's fleeing felon rule in 1993 and simultaneously enacting a new statute limiting the use of deadly force by police officers in making or attempting felony arrests, it intended a substantial change in the law. The court also noted that other states have abandoned the common law version of the fleeing felon rule.

In light of these factors, the court held that a private person making or attempting a felony arrest may use only the amount of force that is reasonable and necessary under the circumstances. The court further held that use of deadly force is, as a matter of law, unreasonable unless the arrestee poses a threat of serious bodily injury to the arrestor or others.

Segler v. Clark County
142 F. Supp. 2d 1264 (D. Nev. 2001)

Summary judgment is not proper in cases alleging medical mistreatment in violation of the Eighth Amendment at county jail when the exact time and extent of medical care is in dispute.

Plaintiff Segler was held in the Clark County Detention Center (CCDC) from October 24, 1997 through December 29, 1997. Prior to his detention, Segler had three surgeries on his shoulder. On November 4, 1997, Segler reinjured his shoulder. That evening, a nurse from EMSA, CCDC's health care provider, treated Segler's shoulder. Segler claimed that the treatment did not occur until four hours after he sustained the injury, but CCDC maintained that EMSA treated Segler within an hour of his injury. On November 5, 1997, EMSA claimed a doctor examined Segler, found no dislocation, and ordered an x-ray. Segler maintained he was never seen by a doctor and requested additional treatment which was never given. After Segler's release from CCDC, he required two additional shoulder surgeries.

Segler brought suit in federal district court under 42 U.S.C. § 1983, claiming violation of his Eighth and Fourteenth Amendment rights. EMSA moved for summary judgment, alleging it was a municipality under 42 U.S.C. § 1983 and, thus, immune from punitive damages. The court found that, while EMSA was a state actor, it was still a private corporation. Accordingly, an award of punitive damages would not punish the taxpayers in the way that such a decision would if EMSA was a municipality. Moreover, the award of punitive damages would act as a deterrent for EMSA's future actions.

The court then considered whether the actions of EMSA violated Segler's Eighth Amendment rights. The court denied EMSA's motion for summary judgment, holding that determining the sequence of events of Segler's medical treatment was the essence of the case and best left to the trier of fact to determine. The denial of medical attention violates the Eighth Amendment if the "denial amounts to deliberate indifference to serious medical needs of prisoners." *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986). Therefore Segler had to demonstrate that EMSA was deliberately indifferent to his medical needs. Since there was a dispute as to how long it took for Segler to receive medical treatment and when Dr. Hoffman actually saw Segler, the court declined to make a determination on these issues of material fact.

Servin v. Nevada
32 P.3d 1277 (Nev. 2001)

Court cannot use multiple crimes of similar gravamen as multiple aggravating factors in imposition of sentence.

Appellant Servin was convicted of shooting and killing a handicapped woman and of stealing \$35,000 that the woman kept in a safe in her home. Two others accompanied Servin, who was sixteen years old at the time of the murder. At trial, evidence was presented that Servin planned to shoot the woman if he had to, hit the woman in the head to make her stop screaming, and pointed the gun at her repeatedly. Servin was subsequently sentenced to death when the jury found five aggravating factors, including that the murder was committed in the course of a burglary and home invasion.

Servin appealed, arguing among other grounds that nearly all persons convicted of murder are eligible for the death penalty because of the conflicting provisions of Nev. Rev. Stat. 175.552 and Nev. Rev. Stat. 200.033. Servin further argued that the imposition of the death penalty upon him violated the International Covenant on Civil and Political Rights (ICCPR) because he was only sixteen years old at the time of the murder. Servin next asserted that he could not be convicted of both burglary and home invasion, so the crimes were mutually exclusive as aggravators of a crime. Finally, Servin argued that the imposition of the death penalty was excessive where the evidence presented at trial was not conclusive in proving that Servin was the direct cause of the victim's death. In fact, the evidence revealed that the accomplices, one of whom had pled guilty to avoid the death penalty, may have also been involved.

Based on these arguments, the Nevada Supreme Court ruled that Nev. Rev. Stat. 176.025 only forbids the execution of juveniles *under* the age of sixteen at the time of the crime. There was no conflict between the ICCPR and Nevada's statute and therefore no error. The court also ruled that aggravating and mitigating circumstances of the crime must be evaluated prior to considering any other circumstances. The conduct that satisfied the elements of burglary and home invasion was the same and, therefore, both aggravators could not stand under Nev. Rev. Stat. 200.033(4). The court held that the key question is whether the gravity of the charged offenses is such that it can be said that the legislature did not intend multiple convictions. Given Servin's youth and the questionable evidence regarding the identity of the shooter, the court vacated the imposition of the death penalty, assigning instead two consecutive life prison terms.

Justice Rose concurred in the judgment, arguing that Servin's youth should also justify the vacation of the death penalty under the ICCPR. Chief Justice Maupin dissented, arguing that the case should be remanded for a new penalty hearing, one which would still allow the imposition of the death penalty. Justice Leavitt also dissented, supported by Justice Young, arguing that the court had no reason to believe that the jury failed to consider the possible weaknesses in the evidence and Servin's youth in imposing the penalty.

Tavares v. Nevada

30 P.3d 1128 (Nev. 2001)

The prosecutor has the burden of requesting that a limiting instruction be given both at the time evidence is introduced and at the final charge to the jury, barring the defendant's objection.

On January 31, 1988, Tavares called 911, indicating that his three-month-old infant, C.T., had stopped breathing. C.T. was brought breathless and pulseless to the hospital, where she was later ruled dead. The doctors determined that she had suffered multiple broken ribs and asphyxiation, which resulted in brain damage and eventual death. Tavares was charged with first-degree murder under alternative theories of either willful, premeditated, and deliberate murder or death resulting from child abuse.

April Striggles, the defendant's ex-girlfriend with whom Tavares had fathered a child, testified at trial. She stated that Tavares once bruised their son's ribs by squeezing him. In a separate incident, Striggles discovered

Tavares covering their son's mouth and nose with his hand, causing him to stop breathing. The testimony was admitted to prove intent and refute an assertion of accident, although the jury was never instructed on the limited purpose for which the prior bad acts evidence was admitted. The jury subsequently convicted Tavares of first-degree murder.

Tavares appealed the failure to give a limiting instruction on the use of prior bad act testimony. While Tavares had not asked for the instruction, the Nevada Supreme Court found that the court may review if the error is plain and affects the defendant's substantive rights. The court held that, since prior bad act evidence is limited in its admissibility, the prosecution must prove that the prior bad acts are admissible as evidence. By extension, the prosecutor also has the duty to request that the jury be instructed on the limited use of the prior bad act evidence. However, the defendant may request that the limiting instruction not be used for strategic reasons. Furthermore, the instruction should be given at the time the evidence is introduced and as a general instruction at the end of the trial. The court held that Tavares's rights were prejudiced by the lower court's failure to inform and instruct the jury on the limited purpose for which prior bad acts may be introduced. Consequently, the defendant's conviction was reversed and the case remanded for a new trial.

United States v. Skuban

175 F. Supp. 2d 1253 (D. Nev. 2001)

Federal law prohibiting firearm ownership by one convicted of domestic violence misdemeanor does not apply to one convicted of a violent misdemeanor against a parent.

Skuban was convicted in February 2001 of assaulting his mother, which, under Nevada law, is considered a domestic violence misdemeanor. Skuban was later indicted under federal law, which prohibits firearm ownership by persons convicted of a domestic violence misdemeanor. Skuban filed a motion to dismiss his indictment because the federal statute does not list child-parent among the qualifying relationships.

The district court granted the motion to dismiss. The court held that the statute clearly contemplated specific relationships between perpetrator and victim, and the child-parent relationship was not specified as one that met the predicate requirements for misdemeanor domestic violence.

Washington v. Nevada

30 P.3d 1134 (Nev. 2001)

Nev. Rev. Stat. 453.323, making the sale of an imitation controlled substance a misdemeanor, was impliedly repealed by Nev. Rev. Stat. 453.332, which made the same crime a felony.

Appellant Washington sold a substance he represented as cocaine to an undercover police officer, although the substance was not actually cocaine. Washington was arrested for the sale, and charged under Nev. Rev. Stat. 453.323, making his actions a felony. Washington argued that a more recently enacted law, Nev. Rev. Stat. 453.332, making the same actions a misdemeanor, should have been applied. The district court rejected Washington's argument,

holding that, since both statutes had been technically amended in 1995, there was no repeal by implication. Washington appealed.

The Nevada Supreme Court found that the trial court erred in concluding that a 1995 amendment of both statutes meant that the legislature had not intended to repeal the earlier statute when they enacted the later one. After examining the text of both statutes, the court determined that the only true difference between the two was the degree of penalty. The court noted that the 1995 amendment was part of a revision of all criminal statutes and that the two statutes shared similar legislative history. As a result, the court concluded that the legislature must have intended that NRS 453.323 be effectively repealed by the passage of NRS 453.332.

CRIMINAL PROCEDURE

Crawford v. Nevada

30 P.3d 1123 (Nev. 2001)

Where continued bail is a condition of a plea agreement, defendant is entitled to withdraw a guilty plea if bail is revoked.

Crawford was charged with the murder of a woman with whom he had been involved. Crawford subsequently entered into a plea agreement, wherein he pled guilty to first-degree murder, resulting in back to back life sentences without the possibility of parole. Crawford then changed his plea to not guilty, and remained on bail within the community for a period of two years. On the eve of trial, Crawford again entered a plea bargain, changing his plea to guilty. Crawford's bail was then revoked, and Crawford was jailed. Crawford alleged that a condition of his second plea bargain was that he be allowed to remain on bail, and moved the court to withdraw his guilty plea. The district court denied the motion, and Crawford was tried and convicted of first degree murder. Crawford appealed, alleging violation of due process and that the district judge engaged in ex parte communication with Crawford's counsel.

On appeal, the Nevada Supreme Court reversed the district court, and held that the district court's denial of Crawford's motion was an abuse of discretion. To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently. The court held that Crawford's guilty plea was not knowing, voluntary, and intelligent, and defendant was entitled to withdraw his plea. Since Crawford's plea was conditioned upon the trial court's promise to allow him to remain out of custody until after Christmas, and the district court subsequently revoked his bail, the Nevada Supreme Court held that the district judge effectively gave Crawford what he wanted in order to induce a guilty plea. In so doing, the judge either insufficiently canvassed Crawford's guilty plea or violated the terms of the plea bargain. Therefore, Crawford was entitled to withdraw his guilty plea.

Hernandez v. Nevada
24 P.3d 767 (Nev. 2001)

While appellate briefs may require more than the standard thirty pages, they should not render a disservice to the [defendant] by obscuring potentially good claims.

The defendant made a motion for leave to file a 124 page opening brief in a direct appeal for a first-degree murder conviction and death sentence. The Nevada Supreme Court denied the motion and concluded that eighty pages were enough to present the court with an effective brief. The court noted that counsel is under no obligation to present every non-frivolous claim. To raise every non-frivolous issue may detract from more credible issues. However, the court noted that it is aware that some situations require briefs longer than the standard thirty pages.

Koger v. Nevada
17 P.3d 428 (Nev. 2001)

Miranda warnings given twelve days prior to an interview are proper warning when the individual is reminded of such rights and the individual acknowledges having been advised of such rights.

Defendant Koger was questioned in connection with an armed robbery. She was first questioned at her place of employment, at which time she was apprised of her *Miranda* rights. She was later questioned again the same day at the detective's office, at which time she was again informed of her *Miranda* rights and signed a waiver form. Twelve days later, she was again interviewed at the police station; police did not offer the *Miranda* warnings after being told by the detective and Koger that she had previously been advised. She gave answers inconsistent with her previous interviews and was charged and ultimately convicted of conspiracy to commit robbery.

Koger appealed, arguing that the district court made a mistake by admitting her interview statements because she was not properly warned of her *Miranda* rights. The state argued that Koger had expressed an understanding of her rights in the first two interviews and that a third warning was not necessary.

The Nevada Supreme Court held that the warnings had been properly administered and affirmed the conviction. The most relevant factor in analyzing whether the previous admonitions were still in effect was the amount of time that had passed since the warning was issued for the third interview. In addition, the court noted that Koger was reminded of her rights and that she indicated that she remembered and understood the rights during the third interview.

Lee v. Clark County Dist. Atty.
145 F. Supp. 2d 1185 (D. Nev. 2001)

To obtain the release of evidence in the custody of the Clerk of the Court, plaintiff must file an action for the release pursuant to Rule 11(3)(b).

Plaintiff Albert N. Lee had exhausted all appeals of his rape conviction by 1996. In 2001, he filed a complaint, seeking the release of all biological evidence collected in connection with the rape of which he was convicted so that it

could be scientifically tested. He named only the Clark County District Attorney's Office as defendant, but filed a motion to amend to include the Clerk of Court because the Clerk had possession of the biological evidence in question. Defendants filed an opposition to the motion to dismiss.

On appeal, the Nevada Supreme Court examined District Court Rule 11, which details the procedure necessary to obtain the release of evidence in the custody of the Clerk of the Court. Rule 11 requires that notice be given to the adverse party prior to making the motion. Since plaintiff Lee had not filed an action for the release of the evidence pursuant to Rule 11(3)(b), the issue was not yet ripe for decision. The court held that there was no reason to believe that such an action would be futile, nor that, if it were, the plaintiff would have waived his right to pursue the matter in United States District Court.

Moore v. Nevada
27 P.3d 447 (Nev. 2001)

A perpetrator cannot "use" a weapon to reach an agreement to conspire; as a result, it is improper to enhance a conspiracy charge via the deadly weapon enhancement.

Moore was one of three perpetrators who conspired to rob the occupants of an apartment. During the robbery, one of the conspirators shot and killed a visitor in the apartment. Moore was subsequently convicted of first-degree murder, robbery, and conspiracy, all with use of a firearm. Pursuant to Nev. Rev. Stat. 193.165(1), the deadly weapon enhancement, the district judge enhanced Moore's conspiracy sentence to be served consecutively rather than concurrently. Moore appealed.

Nev. Rev. Stat. 193.165(1) allows a judge to enhance a sentence based on use of a deadly weapon in the commission of the crime. Moore argued that he could not have used a weapon to commit conspiracy. The state called for a broad construction of the term "uses."

The Nevada Supreme Court found in Moore's favor. In Nevada, the charge of conspiracy does not require an overt act; rather, the essence of the crime is reaching an unlawful agreement. Nev. Rev. Stat. 199.490. The court ruled that a perpetrator could not "use" a weapon to reach that agreement, and held that it is improper to enhance a conspiracy charge with the deadly weapon enhancement. The court reversed that portion of the sentence, and ordered the sentences to be served concurrently.

Nevada v. Quinn
30 P.3d 1117 (Nev. 2001)

With relation to the statute of limitations, "discovery" of a gross-misdemeanor committed in secrecy occurs when any person, other than the wrongdoer, has knowledge of the act and its criminal nature.

Respondent Quinn was charged on December 17, 1998 with lewdness with a minor under fourteen and indecent exposure, in connection with acts that occurred between January 1, 1993 and December 12, 1996. Quinn moved to dismiss the indecent exposure charges because the charges were filed beyond the two-year statute of limitations on misdemeanors. Quinn argues that the statute of limitations tolled from the day that the minor made her mother aware

of the acts. The state claimed that the crimes were not reported to authorities until November 2, 1998, and argued that the statute should not toll until the day that law enforcement became aware of them. The district court held for Quinn.

The Nevada Supreme Court found that Nev. Rev. Stat. 171.095(1)(a) provides that the statute of limitations period for gross misdemeanors committed in secrecy begins to run at the time of discovery of the crime. The court held that discovery meant the discovery by any person other than the wrongdoer, with some limited exceptions based on intimidation. The court remanded to determine if the minor's mother had remained silent out of fear.

Justice Shearing concurred with the result, but argued that the standard requiring a traumatized child to report the child's own trauma was unreasonable. She also argued that the mother had no legal duty to report, and that the court should have established a standard that tolled the statute of limitations until the time a person with a legal duty to report became aware of the crime.

Pellegrini v. Nevada
34 P.3d 519 (Nev. 2001)

Prisoner was denied permission to file his habeas corpus petition because the one-year limitation for successive petitions had passed; allegations of ineffective assistance are properly raised in the first timely post-conviction petition; allegations of ineffective assistance in post-conviction petition was not a good cause for relieving procedural bar. Moreover, decisions in other, non-related cases were not the law of the case under the law of the case doctrine.

Pellegrini was convicted and received the death sentence in a capital murder case. He filed a timely post-conviction petition, which was denied by the Eighth Judicial District Court and subsequently dismissed by the Nevada Supreme Court. The Nevada Supreme Court held that Nev. Rev. Stat. 34.726 applies to all post-conviction petitions. Nev. Rev. Stat. 34.726 provides for dismissal of the habeas corpus petition based on delay in filing, unless there is good cause shown for the delay in filing, if the petition was not filed within one year after entry of the judgment or conviction or one year after the Nevada Supreme Court issued its remittitur. The court held that Nev. Rev. Stat. 34.726 applied to successive petitions. The court articulated one exception: those petitions which were properly filed prior to the passage of Nev. Rev. Stat. 34.726. The court concluded that the intent behind the one year limitation was to prevent perpetual filing of petitions for relief, reducing the strain on the court system. The court also concluded that its decision did not nullify the laches provisions of Nev. Rev. Stat. 34.800 nor the waiver and successive petition provisions of Nev. Rev. Stat. 34.810.

The Nevada Supreme Court also took the opportunity to clarify the Ninth Circuit's use of previous Nevada case law in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995) and *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001). The court stated that claims of ineffective assistance of counsel are properly raised for the first time during the first timely post-conviction petition; the cause and prejudice analysis is not necessary in determining whether these claims are appropriately considered on the merits. The Nevada Supreme Court reaffirmed its holding in *Daniels v. Nevada*, 688 P.2d 315 (Nev. 1984), that the need for an evidentiary hearing to resolve claims of ineffective counsel, the

failure to raise that claim on a direct appeal is not a waiver of the claim for purposes of post-conviction proceedings, provided the claims are brought in a timely first post-conviction petition for habeas corpus.

The court also clarified that *Pertgen v. Nevada*, 875 P.2d 361 (Nev. 1994), does not relax the procedural bars for waiver. However, independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised on direct appeal. Moreover, Nev. Rev. Stat. 178.602 allows the court to review plain errors or defects affecting substantial rights, whether or not they are brought to the court's attention. However, this plain error rule is for review on direct appeal and does not create a procedural bar exception in any habeas proceeding.

The law of the case doctrine states that the law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same. The court rejected the suggestion that the rare exercise of discretion must result in a determination that the law of the case doctrine is inadequate to bar reassertion of a claim in habeas.

Finally, the court overruled *Warden v. Lischko*, 523 P.2d 6 (Nev. 1974), in as much as it supported discretionary application of the procedural bar for waiver: Nev. Rev. Stat. 34.810 is mandatory. Furthermore, the court overruled *Lischko* to the extent that it may be read to suggest that the Nevada Supreme Court "must" review the merits of a post-conviction claim whenever the trial court has elected to do so. The court concluded that good cause and actual prejudice are required to overcome the statutory procedural bars.

In order to demonstrate good cause, the petitioner must show an external impediment prevented him from raising the claims earlier. Actual prejudice requires a showing, not merely that the errors complained of created possible prejudice, but that the errors worked to the petitioner's actual and substantial disadvantage in affecting the state proceeding with error of constitutional dimensions. The court reasoned that it could excuse the failure to show cause where the prejudice from considering the claim amounts to a fundamental miscarriage of justice. In order to avoid application of the procedural bar to claims attacking the validity of a conviction, a person claiming innocence must show that it is more likely than not that no reasonable jury would have convicted him absent the constitutional violation. However, where the petitioner is claiming procedural error when the petitioner is ineligible for the death penalty, the petitioner must show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have found him eligible for the death penalty.

Randolph v. Nevada
36 P.3d 424 (Nev. 2001)

Where defendant raises a defense that implicates a theory of criminal conduct, prosecutors are permitted to instruct the jury as to that theory of criminal conduct; where a prosecutor mischaracterizes the reasonable doubt standard, the Nevada Supreme Court will require an explanation from that prosecutor.

Appellant Randolph robbed and murdered a bartender in Las Vegas. Randolph asserted that Garner, whose car Randolph drove during the night of the crime, was actually responsible for the murder, and that Randolph had partici-

pated only in the robbery. At a jury trial, Randolph was found guilty of first-degree murder with use of a deadly weapon and other offenses. During the penalty phase, jurors considered several mitigating and aggravating factors. Although the state originally charged Randolph with the actual murder, at the end of the guilt phase, the district court instructed the jury on co-conspirator liability and liability for aiding and abetting. Finding that Randolph's aggravating circumstances outweighed the mitigating factors, the jury imposed the death sentence. Randolph appealed, arguing that he was unprepared to argue against conspirator and abetting liability, that the indictment did not allege aiding and abetting charges, that the prosecutor mischaracterized the reasonable doubt standard, and that the district court should have granted a mistrial.

The Nevada Supreme Court held that Randolph was on adequate notice that he could be held liable as a co-conspirator. Several of the criminal counts brought against Randolph made reference to Randolph's intent to further conspiracy. The court also held that, although failing to include a charge of aiding and abetting in the indictment would ordinarily preclude the state from gaining jury instructions on the charge, the prosecution was entitled to jury instruction on aiding and abetting because Randolph raised a defense that implicated a theory of accomplice liability.

The court held that the prosecutor did mischaracterize the reasonable doubt standard, but that it was harmless error. While the court reiterated earlier cautions that prosecutors are in the outer ambit of their authority when they attempt to quantify, clarify, or supplement the statutorily prescribed reasonable doubt standard, such incorrect explanations of the reasonable doubt standard is harmless error as long as the jury instructions correctly define reasonable doubt. Because the lower court's jury instructions corrected this definition, the court found the prosecutor's mischaracterization to be harmless. However, the Nevada Supreme Court noted that the lower court should have firmly admonished the prosecutor for the mischaracterization. Further, the court declared its intention to call this and future prosecutors before the court to account for such mischaracterizations.

Robinson v. Nevada
17 P.3d 420 (Nev. 2001)

A person in civil protective custody for public intoxication is not a prisoner, for purposes of criminal statutes.

Robinson was held in civil protective custody after being publicly intoxicated. Robinson was unable to be placed in an alcohol treatment facility and was subsequently taken to jail. While in civil protective custody, Robinson struck another prisoner and was charged with battery by a prisoner. His status as a prisoner escalated the normal misdemeanor battery to a category B felony. Robinson pled guilty on the condition that he could appeal his prisoner status.

The Nevada Supreme Court found that Nev. Rev. Stat. 458.250 made public intoxication a civil offense. Nevada law defines a "prisoner" as a person who is deprived of his liberty and kept under involuntary restraint, confinement, or custody, as applied in the criminal context of Nev. Rev. Stat. 193.022. The court held that inebriated persons are not subject to the statutory definition of Nev. Rev. Stat. 193.022 because, had the battery been committed at a treat-

ment center, Robinson would not have been charged with felony battery. The court reasoned that Robinson should not have been exposed to greater liability merely because he was taken to the police facility, instead of a treatment facility.

Salaiscooper v. Eighth Judicial Dist. Court
34 P.3d 509 (Nev. 2001)

Justice courts have authority to resolve constitutional issues arising in criminal misdemeanor cases but do not have authority to sit "en banc" or make collective decisions.

Woman charged with solicitation of prostitution alleged that the district attorney's policy violated the equal protection rights of women. The policy offers plea agreements to criminal defendants charged with buying sex, but not those soliciting sex, to avoid convictions by attending diversion classes. At the conclusion of the evidentiary hearing, the judge reserved her ruling so that the other justices of the Las Vegas Justice Court could make a collective decision. All seven justices of the Las Vegas Justice Court unanimously concluded that the district attorney's policy was constitutional.

On appeal, the Nevada Supreme Court held that justice courts do not have authority to sit "en banc" or make collective decisions. However, the court held that a justice court's jurisdiction may resolve constitutional issues arising in criminal misdemeanor cases, overruling *In re Dixon*, 40 Nev. 228 (1916). Additionally, the court reasoned that the district attorney has prosecutorial discretion to treat buyers of sex different than sellers of sex because the policy is not intended to discriminate, rather to deter acts of prostitution. Therefore, the court held that the district attorney's policy does not run afoul of the Equal Protection Clause.

Theis v. Nevada
30 P.3d 1140 (Nev. 2001)

A detainer must be in writing and request that the institution housing the prisoner hold the prisoner for the detainer-filing agency or notify that agency of the prisoner's imminent release.

Appellant, Theis, allegedly committed armed robberies in the counties of Elko and Washoe, Nevada, as well as in Idaho. Idaho authorities apprehended Theis and he was subsequently convicted for the Idaho robberies. After learning of Theis's apprehension, Elko County filed a formal, written detainer with the Idaho prison. Washoe County did not file a written detainer, but did enter relevant information into the National Crime Information Center (NCIC) database. Washoe County also called the Idaho prison in which Theis was incarcerated, requesting that Washoe County be added to Elko County's written detainer. The Idaho prison officer agreed to do so.

Theis, upon receipt of Elko County's written detainer, requested a final disposition, which requires all charges be brought within 180 days. Elko County charged and convicted Theis within the 180-day period. Washoe County brought charges after the 180-day period had run, and Theis sought to have the charges dismissed.

Washoe County claimed the 180-day limitation did not apply to it because it had not filed a detainer in writing with the Idaho prison. Theis argued that either the entering of his information into the NCIC, or the phone call from Washoe County to the Idaho prison, initiated the detainer.

The Nevada Supreme Court held that a detainer must be issued in writing. Detainers are issued based on inter-state agreement, codified in Nev. Rev. Stat. 178.620. As an inter-state compact authorized under the Compact Clause of the Constitution, the court found that federal case law controlled. Although previous federal case law did not address the issue of whether the request must be in writing, it did require that the request be filed with the institution where the prisoner was incarcerated. The court found that entering information into the NCIC does not satisfy this requirement, as the request was not made specifically to the Idaho prison. The court also found that the purpose of a detainer is to inform a prisoner of charges filed against him. The court held that the detainer must be in writing to assure that the prisoner is accurately informed of the charges against him, and to prevent the misinterpretation of an oral communication. The court found that Washoe County had not filed a formal, written detainer with the Idaho prison, and affirmed the trial court's denial of plaintiff's motion to dismiss.

Vanisi v. Nevada
22 P.3d 1164 (Nev. 2001)

District court may refuse to allow defendant to represent himself pro se where defendant is attempting to delay the proceedings by assuming his own defense or defendant has demonstrated a likelihood that pro se representation would disrupt the trial proceedings, but district court may not consider complexity of case and the quality of defendant's defense.

Appellant Vanisi planned and committed the murder of a UNR policeman. Following the murder, Vanisi committed two burglaries, stole a car, and drove to Salt Lake City, Utah. Following a standoff with a SWAT team, Vanisi was apprehended and tried for first-degree murder and three counts of robbery, all with a deadly weapon, and one count of grand larceny. Before the trial, Vanisi unsuccessfully moved to represent himself. The jury imposed the death sentence. Vanisi appealed, arguing that he should have been allowed to represent himself pro se, that the aggravating circumstances of mutilation did not apply, and that the district court erred in refusing to instruct the jury according to Vanisi's version of the reasonable doubt standard.

The Nevada Supreme Court held that the district court was within its discretion to deny Vanisi's motion to represent himself pro se. The lower court determined that Vanisi was attempting to delay the proceedings and represented a risk of disruption in the trial's proceedings, inferences that the court found within the discretion of the lower court and supported by the record. However, the court rejected the lower court's consideration that the case was complex and the defendant would be unable to provide an adequate defense. Considerations of complexity are relevant only in canvassing the defendant to ensure that defendant is apprised of the obligations and duties of a pro se representation.

The court also rejected Vanisi's assertion that there was insufficient evidence to find aggravating circumstances of mutilation. The court highlighted

that the forensic evidence indicated that the victim was severely assaulted in several different manners with a hatchet and “stomping” on the head. Finally, the Nevada Supreme Court held that the lower court did not err in deciding to use the statutory instruction as to reasonable doubt in lieu of Vanisi’s own instruction on reasonable doubt.

Villanueva v. Nevada
27 P.3d 443 (Nev. 2001)

Nev. Rev. Stat. 193.161, the “on-school-property alternative,” is not unconstitutionally vague in granting the district court discretionary options in the sentencing of school-related crimes.

Villanueva shot and injured two high school students, who were members of a rival gang, at their high school. Some of the charges against Villanueva were brought under Nev. Rev. Stat. 193.161(2), which allows the court to sentence defendants to longer than usual terms of imprisonment if a crime occurs on school property. Villanueva moved to strike the charges arising under Nev. Rev. Stat. 193.161(2), alleging that the statute was void for vagueness. The court denied Villanueva’s motion, and Villanueva subsequently pled guilty while reserving his right to appeal the motion to strike.

The Nevada Supreme Court held that the statute’s language, providing that a felony occurring on school property “may” be punished by imprisonment, was not overly vague. The court held that the legislature’s use of “may” was not vague as to what the legislature intended to be done, but rather gave the district court discretion in sentencing. Because the underlying penalties are clear and unambiguous, the discretion to apply the alternative penalty is not vague.

Further, the court rejected Villanueva’s assertion that the legislature impermissibly delegated its authority to define crimes and affix penalties. The court noted that in only two instances has it found an impermissible delegation: challenges to sentences as cruel and unusual punishment and challenges to the authority delegated to administrative agencies. The judiciary has long enjoyed broad discretion in selecting among several sentences specified by the legislature, and the lower court selected such a sentence.

The court also rejected Villanueva’s alternative assertion that Nev. Rev. Stat. 193.161(2) does not apply to inchoate crimes, such as attempted offenses, because another statute, Nev. Rev. Stat. 193.330, governs such attempted crimes. The court noted that Nev. Rev. Stat. 193.330 itself contemplates being supplanted by other statutes that might be enacted by the legislature, and does not therefore displace Nev. Rev. Stat. 193.161(2).

EMPLOYMENT LAW

Coast Hotels & Casino, Inc., v. Nev. State Labor Comm’n
34 P.3d 546 (Nev. 2001)

Employer may require employee to reimburse the employer for shortages if employee voluntarily authorized the withholding in writing.

Employee Sandra Meranian signed a pre-employment waiver, agreeing that her casino employer could deduct any shortages in her cash drawer from her wages. Meranian's cash drawer was short twice. For both shortages, she signed a shortage slip, acknowledging the missing amounts and authorizing the casino to withhold the total from her wages. The amounts were subsequently withheld. Meranian was later discharged for unrelated reasons. After termination, Meranian filed a claim for the wages from the Labor Commission. The hearings officer stated that the casino provided insufficient evidence that the employee was responsible for the shortage, making her authorization invalid. The hearings officer determined that the \$520 that was withheld should be reimbursed to Meranian and fined the casino \$548.

On judicial review, the district court upheld the reimbursement to Meranian but reversed the statutory penalty against Coast. The parties appealed to the Nevada Supreme Court.

The court held that the language of Nev. Rev. Stat. 608.110 did not require that withholdings benefit the employee, so long as the employee authorized the deduction in writing. Thus, it was permissible for cash shortages to be withheld, as long as the employee authorized it in writing.

The court found that the casino provided sufficient evidence to prove that Meranian was responsible for the shortages. The casino had strict rules by which the cashiers were to abide. The cashiers were to count their money before and at the end of each shift. Further, the cashiers were to lock their drawers when away from the money. The court determined that when Meranian was short, she admitted she could not account for the shortage. Nor did she challenge the missing amount when it was discovered at the end of her shift. The court reversed the reimbursement to Meranian and affirmed setting aside the penalty against the casino.

GES, Inc. v. Corbitt
21 P.3d 11 (Nev. 2001)

To hold multiple tortfeasors jointly and severally liable under the "concerted acts exception," there must be an agreement between tortfeasors to engage in conduct that is inherently dangerous or poses a substantial risk of harm to the other.

Respondent Corbitt was employed as a lighting technician for Legends, an entertainment group scheduled to perform at appellant Powerline/VIP's exhibit site during the Consumer Electronics Show in Las Vegas. Corbitt suffered a fractured skull, sinuses, wrist, and elbow when a collapsing truss, assembled by employees of both Powerline/VIP and appellant GES, Inc. (an electrical contractor), knocked Corbitt from a forklift to the ground some thirteen feet below.

At trial, the jury awarded damages against Powerline and GES exceeding \$1,100,000, and assessed the comparative fault, by way of a special verdict, at ten percent against Corbitt; twenty-five percent against GES; and sixty-five percent against Powerline. GES appealed, claiming that the Nevada Industrial Insurance Act immunized GES from suit under workers compensation exclusivity, and that the district court erred in finding it jointly and severally liable with Powerline under the concerted acts exception.

The Nevada Supreme Court noted that a worker may pursue a common law tort action against any tortfeasor who is not his statutory employer or co-employee under the "normal work test" codified in Nev. Rev. Stat. 616B.603(1)(b). The court found that the test would result in immunity to GES only if GES was in the same trade, business, profession, or occupation as Corbitt's employer, Legends. Since Legends' trade was live entertainment, and GES supplied electricity and assembly services, GES did not qualify as a statutory employer under the "normal work test" analysis, and the district court did not err by denying GES's motion for summary judgment.

The court found for GES on the issue of joint and several liability. Nev. Rev. Stat. 41.141(5)(d) creates a limited exception from joint and several liability for defendants who act in concert where comparative negligence is a viable partial defense. Ordinarily when a plaintiff is no more than fifty percent negligent, defendants found liable are presumed to be severally liable unless they act in concert to cause an injury. The court found the "concerted acts exception" requires an explicit or tacit agreement between tortfeasors to engage in conduct that is inherently dangerous or poses a threat of substantial risk of harm to others. While both Powerline and GES assembled the truss and knew that the assembly was incomplete, both were merely negligent in relying upon the other to perform certain acts in erecting the booth. They did not agree to assemble together, or to proceed knowing the truss was likely to collapse. The court reversed the judgment holding GES jointly liable, and held that GES was severally liable for twenty-five percent of the damages awarded based upon the special verdict.

Harris v. Rio Hotel & Casino, Inc.

25 P.3d 206 (Nev. 2001)

If the defendant in a construction case is a landowner that contracted with a licensed principal contractor, the landowner is immune from suit as a matter of law for industrial injuries sustained during performance for the construction contract.

Appellant Harris was injured while working at the Rio Hotel and Casino (the Rio). Harris received worker's compensation benefits from his employer, Marnell Corrao Construction, which was the licensed contractor for a project at the Rio. Harris filed an action against the Rio. The Rio moved to dismiss, claiming it was immune under the Nevada Industrial Insurance Act (NIIA), which provides an exclusive remedy for Nevada workers who are injured in an accident arising out of their employment. The district court granted the Rio's motion to dismiss.

Harris appealed, arguing that a landowner who constructs improvements to real property through a licensed general contractor does not enjoy the same immunity under the NIIA as the contractor.

The Nevada Supreme Court held that if the defendant in a construction case is a landowner that contracted with a licensed principal contractor, the landowner is immune from suit as a matter of law for industrial injuries sustained during performance of the construction contract. The court cited several policy considerations supporting the conclusion. First, worker's compensation should protect the property owner, who is indirectly paying the cost of the

worker's compensation coverage. Second, if commercial property owners were liable to injured construction workers, they would be at a greater financial risk than if their own employees were to do the work. Finally, property owners who have little expertise in the area of construction should be encouraged to retain experienced contractors to reduce the risk of injury.

Justice Rose concurred, but urged the court to recognize the "dual capacity doctrine," which recognizes that an employer may take on a second role that confers obligations, including tort liability, independent of those imposed on an employer. However, Justice Rose conceded that the doctrine would not have been applicable in this case.

In re Norbert

258 B.R. 459 (D. Nev. 2001)

The Bankruptcy Code's prohibition against private employers terminating employment of, or discriminating with respect to employment against, a bankruptcy debtor does not apply to actions taken by the private employer before the filing of bankruptcy.

Appellant appealed the bankruptcy court's decision that 11 U.S.C. § 525(b), which prohibits a private employer from terminating the employment of, or discriminating with respect to employment against, an individual who is or has been a bankruptcy debtor, does not apply to an employer's actions against an individual who had not yet filed for bankruptcy. The district court reasoned that interpreting the phrase "an individual who is or has been a debtor under this title" to include persons who have not filed for bankruptcy prior to the alleged discriminatory acts by the employer, destroys the plain meaning of 11 U.S.C. § 525(b).

Morrow v. Putnam

142 F. Supp. 2d 1271 (D. Nev. 2001)

Government agency supervisors may be sued as employers under the Family Medical Leave Act.

Plaintiff Morrow took medical leave from his job with the United States Postal Service. When he returned to work, he was placed in a new and unequal position in comparison to his former station. He subsequently sued his supervisors and the Postmaster General, claiming that this action violated the Family Medical Leave Act (FMLA). The defendants argued that as government agency employees, they were immune from such suit, though they were the plaintiff's supervisors.

The district court held that the plain language of the FMLA clearly applied to government agencies. Further, the language was clear in extending liability to persons in supervisory positions. Finding no specific exemption for government agency supervisors, the court held that such supervisions were liable under the FMLA.

Although the court did acknowledge that evidence may reveal that some defendants did not have sufficient authority over the plaintiff to be considered employers under the FMLA, government agency supervisors may be sued under the FMLA as a matter of law.

Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.
156 F. Supp. 2d 1170 (9th Cir. 2001)

General contractors are liable for indebtedness of labor incurred by any subcontractors working under the general contractor.

General contractor Richardson Construction employed subcontractor Desert Valley. When Desert Valley failed to require employee benefit contributions, plaintiff trustees obtained a default judgment against Desert Valley. Trustees subsequently filed a motion for partial summary judgment against the general contractor under Nev. Rev. Stat. 608.150(1), which makes general contractor's liable for indebtedness incurred by their subcontractors.

The trustees argued that the default judgment against the subcontractor had the same legal impact as against the general contractor. The defendant claimed the default judgment was not applicable to defendant, arguing that, when a joint claim is made against several defendants, a defendant's failure to appear only equates to a waiver of the defaulting defendant's standing to appear. Richardson argued that extending Desert Valley's default to Richardson would deprive it of the right to a jury trial.

The Nevada Supreme Court granted partial summary judgment. The court found that the phrase "indebtedness for labor" in Nev. Rev. Stat. 608.150(1) includes employee benefits provided for in collective bargaining agreements. The court rejected Richardson's joint claim argument, finding that the trustees' claim was against Richardson for Desert Valley's indebtedness. The court also held that Richardson's request for a jury trial should have been made when they intervened in the case, not after damages were assessed.

IMMIGRATION LAW

Gato-Herrera v. Immigration & Naturalization Serv.
130 F. Supp. 2d 1213 (D. Nev. 2001)

Immigration parole entry into the United States does not constitute entry for purposes of constitutional protections against continued detention.

Herrera entered the United States from Cuba on an immigration parole. After being jailed for criminal conduct in the United States, Herrera was found to be inadmissible into the United States and ordered removed. He remained in detention by the Immigration and Naturalization Service (INS). Federal law only permits the detention of removable aliens for a reasonable time beyond the ninety-day period after the order of removal. 8 U.S.C. § 1231(a)(6). Herrera claimed that his detention was a violation of the Constitution, and petitioned for release.

The district court ruled that, under immigration parole, there is no true entry into the United States. Since the petitioner did not enter the country, he had no claims under the Constitution or federal statutes. The court also stated that if the federal law in question is in conflict with international law that states the petitioner's detention cannot be prolonged and arbitrary, federal law displaces international law.

Herrera claimed that the Nicaraguan Adjustment and Central American Relief Act of 1997 and the Cuban Adjustment Act of 1966 automatically adjusted his status to a lawful permanent resident.

The district court held that none of these acts automatically adjusted his status merely by their enactment. Each act requires the alien to meet certain criteria based on the Act. Moreover, both acts require the alien to apply for the adjustment, which Herrera did not.

Because Herrera was not admitted to the United States other than under the provisions of an immigration parole, and because he failed to apply to change his status, the court held that his continued detention did not violate the United States Constitution.

Hays Home Delivery, Inc. v. Employers Ins. Co. of Nevada
31 P.3d 367 (D. Nev. 2001)

Where a subcontractor is involved in the same trade as the contractor and the subcontractor's activities would normally be carried out by employees rather than independent contractors, the subcontractor is considered an employee for purposes of state workers' compensation law.

Green, an owner/operator who delivered furniture for Hays, was hurt on the job. After failure to pay his premium, Green submitted a claim to Employers Insurance Company of Nevada, Hays' insurer, which was eventually honored. Hays appealed to the district court, arguing that Green was not an employee. The district court affirmed the claim, and Hays appealed to the Nevada Supreme Court.

The court found that Green was under a contract of hire and that Green was in the same trade as Hays. The Nevada Industrial Insurance Act (NIIA) explicitly allows independent contractors to be considered employees. Nev. Rev. Stat. 616A.210(1). In addition, the court noted that the case was a non-construction case, such that the normal work test from *Meers v. Haughton Elevators*, 701 P.2d 1006 (Nev. 1985), applied. As a result, the NIIA treats Green as an employee for purposes of workers' compensation, even though Green was involved in an independent enterprise distinct from that of Hays. The court reaffirmed the ruling in *Meers* that, where an independent contractor's indispensable activity is normally carried on through employees of a company or enterprise, the independent contractor is considered an employee for purposes of worker's compensation.

Tarango v. State Indus. Ins. Sys.
25 P.3d 175 (Nev. 2001)

Injured, undocumented aliens may be denied some of Nevada's workers' compensation benefits.

Tarango, an undocumented alien, suffered an industrial injury while at work. After receiving maximum medical treatment, doctors recommended vocational rehabilitation. The State Industrial Insurance System (SIIS) awarded claimant permanent partial disability but required claimant to submit Immigration and Naturalization Form I-9 as proof of his right to work in the United States. Claimant failed to satisfy the verification requirement and SIIS subsequently suspended his benefits until proof was provided. Claimant argued

that, under Nevada's workers' compensations laws, an injured worker is entitled to full workers' compensation benefits regardless of immigration status. SIIS held against Tarango, and he appealed.

The Nevada Supreme Court held that the Federal Immigration Reform and Control Act precludes an employer from modifying employment or vocational training benefits under Nev. Rev. Stat. 616C.530 for undocumented claimants. The claimant argued that SIIS's denial of vocational rehabilitation benefits violated the Fourteenth Amendment. The court held that, while undocumented aliens have a right to equal protection under the Fourteenth Amendment, certain benefits may be withheld from undocumented aliens because their presence in the United States is a crime. Thus, benefits that promote an undocumented alien's vocational training in the United States will be denied.

PROFESSIONAL RESPONSIBILITY

In re Schaefer

25 P.3d 191 (Nev. 2001)

Supreme Court Rule 182 applies to an attorney, even when representing himself.

After hearing two formal complaints against attorney Michael Schaefer, the Southern Nevada Disciplinary Board concluded that Schaefer violated various professional conduct rules and recommended his disbarment. The panel found various violations of the Supreme Court Rules, including Sup. Ct. R. 182, which prohibits communication with persons represented by counsel. Schaefer's Sup. Ct. R. 182 violations occurred during Schaefer's litigation with Mirage Resorts, Inc., when he repeatedly communicated with Mirage officers, directors, and employees concerning the litigation. General counsel for Mirage Resorts, Inc., specifically instructed Schaefer to communicate only through him.

On automatic appeal, Schaefer argued he did not violate Sup. Ct. R. 182 when representing himself pro se. He argued that the rule was unconstitutionally vague and unconstitutional under the First Amendment because it was a content-based restriction. The Nevada Supreme Court determined Sup. Ct. R. 182 was vague in Schaefer's situation and subsequently did not consider three of the Sup. Ct. R. 182 violations because of the rule's uncertainty. However, the court warned that the rule applies to lawyers acting pro se and is constitutional. The court also did not consider the Sup. Ct. R. 203(1) violation, Sup. Ct. R. 203(2) violation, or the four Sup. Ct. R. 203(4) violations because these violations were not charged in the complaint. The court found the other violations were supported by clear and convincing evidence.

Schaefer's pattern of misconduct, his numerous ethical violations, and his denial of guilt supported the panel's findings of aggravating factors and its recommendation for disbarment. As a result, the court disbarred Schaefer and ordered him to pay the disciplinary proceeding costs.

Moran v. Bonneville Square Assocs.
25 P.3d 898 (Nev. 2001)

Failure to provide complete and accurate responses to docketing statement requests resulted in monetary sanctions.

Appellant Moran's counsel, Kirk T. Kennedy, was required to provide responses to two docketing statement requests as part of an appeal in a personal injury action. The requests required Moran to show that a motion for a new trial was filed and rejected, and that Moran included copies of all the last-filed pleadings, respectively.

The Nevada Supreme Court held that Kennedy failed to provide the appropriate responses, and sanctioned Kennedy for that failure. The court found that both requests pertained to jurisdiction of the Nevada Supreme Court. The Nevada Supreme Court is a court of limited appellate jurisdiction and the burden of showing jurisdiction rests with the appellant. The docketing statement requests are designed to facilitate that showing without requiring the court to issue an order to show cause why the appeal should not be dismissed. Further, the court noted that the first page of the docketing statement form includes a warning that all requests should be fully and accurately completed or sanctions may be imposed.

The court held that Kennedy's neglect showed a lack of consideration and that the requests were not given the proper, careful attention they required. As a result, he was sanctioned \$500 for his conduct.

Mosley v. Nev. Comm'n on Judicial Discipline
22 P.3d 655 (Nev. 2001)

Adjudicators who engage in investigative, prosecutorial, and adjudicative functions are entitled to presumption of honesty and, therefore, the combination of functions does not violate due process.

The Las Vegas Review Journal reported that Judge Donald Mosley used his judicial office to secure favorable testimony in an attempt to gain custody of his son. The Nevada Commission on Judicial Discipline instituted an investigation, concluding that sufficient probable cause existed to warrant formal disciplinary hearings. In his answer, Judge Mosley claimed that the Commission's proceedings were unconstitutional because the combined investigative, prosecutorial, and adjudicative functions deprived him of the property interest inherent in his position without due process. When Judge Mosley's motion to dismiss was denied, he filed a motion for extraordinary relief with the Nevada Supreme Court, which was granted.

The court found that, in order to prove violation of due process, a defendant must overcome the presumption that the adjudicators are honest and prove there is a risk of actual bias. Since Judge Mosley offered no evidence of actual bias, the court concluded that his due process rights had not been infringed.

The court did agree with Judge Mosley's assertion that the State Bar had improperly delegated power to the executive director of the Commission to appoint replacements for two members who had recused themselves.

Justice Shearing, joined by Justice Agosti, concurred with the due process holding, but dissented on the holding pertaining to replacement of Commission members. The majority held that the State Bar's power to appoint replacement

members of the Commission was a specific power that the Bar was precluded from delegating. Justice Shearing asserted that delegation should be allowed for the appointment of one-time substitutes.

Justice Leavitt concurred that the appointment process had been improperly delegated but dissented from the majority's solution, which required the Bar to appoint two new members to hear the Mosley case. Justice Leavitt asserted that all actions taken by the improperly-constituted Commission should have been voided and the action begun anew.

PROPERTY

Besnilian v. Wilkinson **25 P.2d 187 (Nev. 2001)**

One party to a declaration of homestead cannot alienate a homestead property without the other party's consent.

In 1975, husband and wife Simon and Glenda Besnilian acquired property in joint tenancy. In 1990, the couple jointly executed a declaration of homestead. Later, and unbeknownst to Glenda, Simon deeded half of the property to a third party. Simon subsequently died, and when Glenda brought an action to quiet title some time later, the trial court denied the action as foreclosed under the doctrine of laches. Glenda appealed.

The Nevada Supreme Court held that a spouse may not alienate a homestead without consent of the other spouse. The court ruled that the homestead law is intended to protect the family home. Prohibiting a spouse from conveying their interest in the homestead/joint tenancy estate, without the knowledge and consent of the other spouse, furthers the intent of the homestead law.

Justice Agosti concurred, noting the impact of this decision on property law. Justice Agosti claimed that the decision transmuted property held in joint tenancy into community property, arguing that the majority's holding subjects homestead property held in joint tenancy between spouses to the same disposition as property held by spouses as community property.

Justice Rose dissented, focusing on the fact that the effective changes enumerated in the concurrence were not necessary to give full effect to a declaration of homestead. Justice Rose also urged that there was no indication of such intent in Nevada law.

Churchill County v. United States **199 F. Supp. 2d 1031 (D. Nev. 2001)**

Secretary of the Interior's decision to transfer land into trust for the benefit of the Fallon Paiute-Shoshone Tribe held lawful.

The Fallon Paiute-Shoshone Indian Tribes acquired thirty-seven acres of land in Churchill County and the United States took the land into trust. Churchill County disputed the validity of placing the land into trust, arguing that: 1) the intent of the enabling statute is to allow the tribe to acquire land and water rights solely for agricultural purposes; 2) the Secretary failed to consider the factors in 24 C.F.R. § 151.1 when he decided to place the land in trust; 3) the statute unconstitutionally delegates legislative power to the agency; and 4) the

statute is unconstitutional as a violation of equal protection under the Fifth Amendment. The Tribes moved to dismiss for failure to state a claim.

The district court granted the motion to dismiss. It held that, while the enabling statute mentioned water rights, it did not limit the use of the land. The court also held that the legislature imposed standards for the Secretary of Interior to follow that were unambiguous and within the boundaries of acceptable delegation to an administrative agency, making them constitutional.

Mark Props., Inc. v. Nat'l Title Co.
34 P.3d 587 (Nev. 2001)

An escrow agent must inform a party to the escrow of any fraud committed if facts known to the escrow agent provide substantial evidence of such.

Mark Properties (Mark) consisted of two real estate investors who participated in a joint venture with other investors. Mark later discovered that the seller of the parcel they planned to purchase was not an unrelated third party, but a co-investor. The co-investor falsely informed Mark that the purchase was only to facilitate acquisition of the property, and that there was no difference in the purchase price. Mark later learned that the property was indeed purchased for a lower price, and that their co-investors had obtained a double escrow on the property at issue. Mark argued that defendant, National Title, knew the details and should have divulged any potential fraud to them. The district court granted summary judgment to defendant National Title, and Mark appealed.

The Nevada Supreme Court reversed, holding that an escrow agent has a legal duty to disclose fraudulent circumstances, of which it is aware, to another party to the escrow if the circumstances present substantial evidence of fraud. To do otherwise would effectively render the agent a participant in the fraud. In its opinion, the court disagreed with other jurisdictions, which have refused to impose such disclosure on the basis that such disclosure would subject the escrow agent to a high risk of litigation. However, the court also held that an escrow agent does not have a duty to disclose to a party that is not a party to the escrow, and moreover, does not have a duty to investigate circumstances surrounding a particular sale to discover fraud.

Nev. Tax. Comm'n v. Nev. Cement Co.
36 P.3d 418 (Nev. 2001)

The primary-purpose test applies in determining if an item, used both in the manufacturing process and as an ingredient in the finished product, is a retail sale or a sale for resale.

Nevada Cement manufactures cement by using four pieces of equipment that gradually disintegrate over time and are incorporated into Nevada Cement's finished product. As a result, the equipment has the dual purpose of assisting in the manufacturing process and contributing to the ingredients of the final product.

A sales or use tax must be paid on all tangible personal property sold at retail in Nevada. The sales tax applies to property sold at retail in Nevada, while the use tax applies to property purchased outside the state but stored, used, or consumed in Nevada. Items purchased for resale are exempt from the sales and use tax. Nevada Cement's liability depends upon whether its

purchase constituted a retail sale or a sale for resale. Nevada Cement initially paid either sales or use taxes on the four pieces of equipment, and then later requested a refund. The Nevada Department of Taxation denied the request.

Nevada Cement filed a petition for re-determination, claiming that, because the process eventually incorporates the equipment into the finished product that was later sold, the equipment purchase was for resale and not retail, and should be tax exempt. The matter proceeded to an administrative hearing, and the Department hearing officer denied the refund claim. On administrative appeal, the Tax Commission determined Nevada Cement purchased the equipment for manufacturing cement and upheld the hearing officer's decision.

Nevada Cement contended the proper test to apply is the physical-ingredient test, which states that, where an item becomes a physical ingredient or a component of the finished product, it is a sale for resale and therefore exempt from the sales and use tax. The Commission contended that the sole-purpose test applies, which states that, if any purpose of a dual-purpose item is not for resale, then the sales and use tax applies.

The Nevada Supreme Court held that the primary-purpose test applies. This test looks to the primary purpose of the purchase to determine if the sale is at retail or for resale. If one purchases an item primarily to aid the manufacturing process, it is taxable, regardless if it becomes part of the finished product. If one purchases an item primarily to become part of the finished product, it is exempt as sale for resale, regardless of whether it assists in the manufacturing process. Therefore, the district court erred in applying the physical-ingredient test.

The court held the record demonstrated that Nevada Cement purchased the equipment for the primary purpose of manufacturing cement. The contribution to ingredients was only a secondary purpose. Under the primary-purpose test, the equipment purchased by Nevada Cement was taxable as a retail sale.

Pro-Max Corp. v. Feenstra
16 P.3d 1074 (Nev. 2001)

Under Nev. Rev. Stat. 106.240, liens on real property are presumed extinguished ten years after debt is due.

Pro-Max Corporation borrowed money in 1982 from various shareholders in order to secure funding for real property. Pro-Max signed promissory notes to those from whom it borrowed, which were secured by deeds of trust on the purchased property. These notes became due two years after their execution on May 14, 1984. However, no payment was ever made, including after the sale of the property in 1996. The trial court interpreted Nev. Rev. Stat. 106.240 to provide protection to bona fide purchasers and held that the statute did not, in fact, extinguish the notes.

On appeal, the Nevada Supreme Court found that the trial court erred in its interpretation. The court held that the statute was clear and unambiguous and the notes were extinguished on May 14, 1996, ten years after they became due. The court remanded the case for a determination of whether Pro-Max should be estopped from claiming protection under Nev. Rev. Stat. 106.240.

Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.
2001 Nev. LEXIS 82 (D. Nev. 2001)

Although respondent was granted title to land in dispute before the court, attorney's fees were improperly granted because respondent failed to demonstrate proximate cause between the fees and the appellant's actions.

Dispute between appellant (developer) and respondents (homeowners' association and individually-named land owners) arose over property that the respondents asserted was intended to be conveyed to respondents as common areas. The appellant argued that the land in question was not included in the description of land indicating common areas. The appellant further contended that the lower court erred in awarding attorney's fees because attorney's fees cannot be recovered unless authorized by agreement, statute, or rule, none of which applied to this case. Respondent asserted that fees were not awarded as costs, but as recoverable damages in the underlying action.

The Nevada Supreme Court affirmed the lower court's decision granting title, holding that the lower court's determination was based on findings of fact. However, the court reversed the lower court's decision to grant attorney's fees to the respondents and remanded the case for further determination of whether the fees were proximately caused by the conduct of the appellant.

The court agreed with the appellant's assertion that attorney's fees cannot be recovered as a cost of litigation unless authorized by agreement, statute, or rule, which was not the case here. However, the court also noted that fees may be claimed as the foreseeable damages resulting from tortious conduct or a breach of contract, considered special damages. In order to claim special damages, Nev. R. Civ. P. 9(g) requires that they be pleaded as such in the complaint and proved by competent evidence, similar to any other claim for damages. Further, when attorney's fees are considered as damages, they must be the natural and proximate result of the injurious conduct, and be proven as to each claim. Respondents did not allege fees as special damages, but instead mentioned the legal fees only in the general prayer for relief. The lower court erred in viewing affidavits from the respondents as a basis for granting relief rather than conducting an evidentiary hearing to determine if the fees were a proximate cause of the appellant's actions.

S.O.C., Inc. v. Mirage Casino-Hotel
23 P.3d 243 (Nev. 2001)

Hotel-casino's conveyance of a pedestrian easement to the county for sidewalk abutting property did not create a public forum wherein commercial advertisements may be distributed against the wishes of the property owner.

The Mirage conveyed a perpetual pedestrian easement, in the form of a sidewalk, along the Las Vegas Strip to Clark County. S.O.C. used the sidewalk as a place to distribute business advertisements for nude dancers. The Mirage sought an injunction to enjoin S.O.C. from further distributing literature on the sidewalk. S.O.C. alleged the First Amendment protected their right to distribute literature on the sidewalk. The trial court granted a temporary injunction and S.O.C. appealed.

The Nevada Supreme Court found the granting of an easement to be insufficient to transform private property into a public forum. The right to exclude

certain persons or activities is one of the chief characteristics of private property ownership. Private property does not become public simply because the public is permitted access. The court found that easements are only as broad as necessary to accomplish its purpose. Here, Mirage's purpose was to allow pedestrians to traverse the Strip, not to provide a place where others could conduct business.

The court also found that, generally, constitutional requirements are not imposed on a private actor. The First Amendment secures an individual's right to not have his freedom of speech infringed upon by a state actor, not a private individual or corporation. Since Mirage is not a government entity, constitutional protections did not apply to their sidewalk.

Justices Maupin and Shearing concurred, but found that the commercial nature of the plaintiff's business is key to the decision not to permit the distribution of materials on the sidewalk. Commercial speech is not afforded full constitutional protections.

Justice Rose dissented, asserting that the location and purpose of the sidewalks dictate the degree of control the owners can exercise. In this case, the sidewalks are the only means of traversing a busy street, and are therefore clearly a public forum. As a public forum, the protections of the First Amendment are implicated.

TORTS

Borgenson v. Scanlon **19 P.3d 236 (Nev. 2001)**

The Firefighter's Rule, codified at Nev. Rev. Stat. 41.139, does not allow recovery of damages if a police officer sustains an injury while apprehending a suspect because the suspect's parents did not negligently interfere with the arrest and the suspect's flight was a reasonably foreseeable component of an officer's duties.

Robert and Patricia Scanlon were holding a family reunion at a family owned bar when their son, David, arrived drunk and violent. Robert called 911 and officers Borgenson and Snarr responded. While chasing David, who fled the scene, Borgenson fell and suffered leg injuries. Borgenson alleged that Robert and Patricia negligently interfered with David's arrest, allowing him to flee, leading to the injuries.

The district court granted Robert and Patricia's motion for summary judgment, concluding there was no evidence that either Robert or Patricia instigated David's flight, and that, therefore, the Firefighter's Rule precluded Borgenson's recovery because he sustained the injury in the course of his official duties. Patricia filed a motion for costs pursuant to Nev. Rev. Stat. 18.005 and 18.050, Borgenson filed a motion to retax costs, and the district court reduced and denied costs, awarding \$14,209.26 to Patricia. Borgenson appealed the summary judgment, contending the Firefighter's Rule, as codified at Nev. Rev. Stat. 41.139, does not preclude recovery because Robert and Patricia's actions constitute independent acts outside the scope of Borgenson's official duties. Borgenson also argued that Patricia is vicariously liable for David's acts under

the duty of the parent-child relationship, and the district court abused its discretion by awarding unreasonable costs to Patricia.

On appeal, the Nevada Supreme Court held that a district court cannot determine credibility of witnesses or the weight of evidence when resolving a motion for summary judgment. At common law, the Firefighter's Rule bars recovery of negligent damages incurred during the scope of official duties because the officer assumes all normal risks inherent in the employment. Nev. Rev. Stat. 41.139 limits this common law rule and allows recovery when the negligence is unforeseeable or an independent or intervening act. The court concluded the district court correctly determined there was no evidence of negligent interference and that pursuing a suspect is a reasonable extension of an officer's official duties; therefore, the Firefighter's Rule bars Borgenson's claim.

The court also stated that it has only recognized a parent to be vicariously liable for a child's actions in cases of motor vehicle ownership or negligent entrustment of motor vehicles where the child is a minor; there is no indication Patricia had any control of twenty-nine-year-old David. Additionally, neither party submitted documentation for costs in the appellate record; therefore, vicarious liability is not at issue and the court affirmed the district court's award of costs.

Burns v. Mayer

175 F. Supp. 2d 1259 (D. Nev. 2001)

Tort claims based on sexual harassment are not preempted by Nevada workers' compensation law.

Plaintiff Burns, an employee of Harrah's Garden Café, claimed that she was subjected to male co-workers simulating male appendages with food products, asking her to have sex with them, touching her buttocks, and commenting on her breasts, buttocks, and menstrual cycle. She filed suit against Harrah's and individual co-workers, claiming sexual harassment and retaliation under Title VII, violation of Nevada's antidiscrimination suit, and respondeat superior liability for the tort actions of her co-workers.

The defendants filed summary judgment motions as to all the claims. Harrah's argued that Burns had not shown that the acts constituted a hostile work environment, and that Harrah's had no respondeat superior liability for its employees' acts. In addition, Harrah's claimed that Nevada workmen's compensation law preempted Burns's tort claims.

The district court denied defendant Harrah's motion for summary judgment on the sexual harassment claims, holding that Harrah's had shown insufficient evidence to deny the hostile work environment claim. The court held that Harrah's may be held liable for the tort actions of its employees under the theory of respondeat superior, given that the alleged acts of sexual harassment fell within the scope of tasks assigned to the employees. Further, the court found Harrah's had not demonstrated that it took prompt, effective action to remedy the inappropriate behavior towards the plaintiff.

The court also denied Harrah's contention that the tort claims were preempted by Nevada's worker compensation law, as that law covers injuries sustained by accident during the course of employment. The court found it

implausible that the alleged acts could have occurred “accidentally.” The court also denied Harrah’s contention that plaintiff’s emotional distress claims would be preempted by Nevada’s anti-discrimination law, as most courts permit both a sexual harassment claim under state anti-discrimination laws and an emotional distress claim under common law.

The court denied the individual defendants’ motion for summary judgment on the intentional infliction of emotional distress claim because other courts have found that behavior similar to that of the defendants could rise to the level of extreme and outrageous conduct. Whether or not the behavior constituted “extreme or outrageous” conduct was to be determined by the trier of fact. Further, the plaintiff presented sufficient evidence as to her emotional distress that such could be considered severe.

The court did grant summary judgment for the individual defendants as to the defamation claim because the plaintiff was unable to prove the claim at the time of the motion, but claimed she would be able to do so at trial. As plaintiff could not prove at trial what she was required to show at summary judgment, and the plaintiff had no supporting testimony other than her own speculation, the court held that her defamation claim failed.

Krause Inc. v. Little
34 P.3d 566 (Nev. 2001)

Jurors may reenact an expert’s experiment using admitted evidence and objective injuries, such as broken bones, and do not require expert testimony for the jury to award future pain and suffering damages.

Respondent Don Little used a Multimatic ladder, manufactured by appellant Krause, which he purchased from appellant Home Depot. The ladder collapsed when Little’s foot accidentally bumped the release lever, causing him to fall to the ground. In the fall, Little broke his ankle in two places and was subsequently unable to resume full activity for two and one-half months. In the ensuing product liability suit, Little’s expert witness testified as to the possibility that such an accident could occur. During deliberations, the jury reconstructed the expert’s demonstration in order to reach a verdict. The jury subsequently awarded Little \$80,000 in past damages and \$20,000 for future pain and suffering. Appellant’s motion for a judgment notwithstanding the verdict was denied, and an appeal followed.

Krause argued that the jurors reconstruction of the expert witness’s experiment was an improper introduction of new evidence, and that the plaintiff’s failure to present expert testimony regarding future pain and suffering was improper.

The Nevada Supreme Court affirmed the trial court verdict. The court determined that the jury’s use of admitted evidence to reenact an expert witness’s experiment did not constitute the introduction of new evidence, but rather that the jury was merely “examin[ing] the accuracy of Manning’s expert testimony.” Regarding the second issue, the court stated that medical testimony is necessary when injuries are subjective and cannot be demonstrated to others; however, a broken bone is an objective injury that does not require expert testimony for a jury to award damages for future pain and suffering.

Justice Becker concurred, but dissented as to the future damages instruction. In dissent, Justice Becker stated that the cases cited to by the majority did not hold that an expert testimony is unnecessary to prove future pain or suffering when the injury is objective, but rather hold that expert testimony is unnecessary where the cause of future pain, suffering, or disability is objectively demonstrable to the trier of fact.

Lee v. GNLV Corp.

22 P.3d 209 (Nev. 2001)

Restaurant employees did not breach their duty of care to a restaurant patron by failing to perform the Heimlich maneuver.

The Carson Street Café, located in downtown Las Vegas, is a restaurant owned by GNLV Corp. Mr. Sturms and his companion went to the Carson Street Café for dinner after drinking alcohol earlier that evening.

Shortly after beginning their meal, Mr. Sturms appeared ill, vomited in his lap, and afterward slumped over in his chair. Security officers and a waitress were summoned to the table and checked Sturms' pulse, that first appeared normal, but quickly began to deteriorate. The Las Vegas Fire Department paramedics were called to the restaurant. In the meantime, security personnel attempted to give Mr. Sturms CPR, as well as oxygen, but did not perform the Heimlich maneuver.

When the paramedics arrived, they attempted unsuccessfully to revive Mr. Sturms. Sturms was then rushed to the hospital where doctors also attempted unsuccessfully to clear his airway. Sturms was pronounced dead at 10:10 pm. The autopsy report concluded Mr. Sturms death was caused by food lodged in his upper airway.

Mr. Sturms' wife, Ahiliya Lee, sued GNLV for negligence, arguing failure on the part of GNLV to exercise reasonable care. GNLV moved for summary judgment, alleging it fulfilled its duty by taking reasonable measures to aid Mr. Sturms when his condition appeared to deteriorate.

The Nevada Supreme Court found that there is a special relationship between the restaurant and its patrons, requiring that the restaurant take reasonable steps to fulfill its duty. The court held that GNLV's employees fulfilled their duty by summoning professional help, and were under no legal duty to perform the Heimlich maneuver.

Lubin v. Kunin

17 P.3d 422 (Nev. 2001)

Statements published by defendants could be construed as defamatory and were for the jury to determine.

Appellant Lubin served as a director of a private school. The parents of several students believed Lubin's mismanagement caused, among other problems, high teacher turnovers. The disgruntled parents printed flyers and handouts, reproducing statements from a judicial complaint arising out of a lawsuit between the director and the school's Board of Trustees. The flyers implied child abuse occurred at the school and, as a result, a lawsuit alleging child abuse was filed.

Lubin filed a defamation suit. The defendant parents filed a motion to dismiss. They claimed the statements were opinions and protected by privilege. The district court granted the motion to dismiss, finding the director failed to allege a false and defamatory statement of fact. Lubin appealed.

The Nevada Supreme Court held that the district court erred in granting the motion to dismiss because the statements in question were capable of a defamatory construction. The court held that a jury must determine whether statements are false. The court reasoned that, since the statements by the parents implied the existence of factual information to backup the allegations, the parents were not merely stating opinion. The flyers contained mixed statements of opinion and fact that lent an air of accuracy; thus, the court concluded that the falsity of the statements was for the jury to determine. The court also held that the statements were not privileged because the one-sided nature of the statements excluded them from consideration as fair and accurate reporting.

Woodsley v. State Farm Ins. Co.

18 P.3d 317 (Nev. 2001)

The comparative negligence standard articulated in Nev. Rev. Stat. 41.141 is integrated into the doctrine of res ipsa loquitur.

Douglas Adams was killed in an automobile accident when he swerved to avoid a ladder lying in the middle of his lane on the highway and collided with a truck stopped in the emergency lane. Based upon Adams' auto insurance policy, the estate filed a claim to collect uninsured motorist benefits, alleging negligence on the part of an unknown driver for dropping the ladder. State Farm refused to pay the claim, and the estate filed a breach of contract claim.

The estate contended that it was entitled to uninsured motorist benefits because the accident was substantially caused by the negligence of the unknown driver, in reliance on the doctrine of *res ipsa loquitur*. State Farm countered that Adams' contributory negligence was greater than the unknown driver and, therefore, prevented the recovery of uninsured motorists' benefits. The estate requested a jury instruction pertaining to *res ipsa loquitur*. The district court refused to give the jury instruction because Adams was contributorily negligent and, therefore, in violation of the third element of the *res ipsa loquitur* doctrine (requiring that plaintiff make no contribution to the event). The estate appealed, arguing that modern comparative negligence law and Nev. Rev. Stat. 41.141, passed in response to changes in the common law, required that the third prong of *res ipsa loquitur* be enforced only where the plaintiff's negligence is greater than that of the defendant.

The Nevada Supreme Court reversed the lower court, recognizing the need to incorporate the statute into the *res ipsa loquitur* jury instruction. The ruling expressly overrules *Bialer v. St. Mary's Hospital*, 427 P.2d 957 (Nev. 1967), which previously set forth the three elements for the *res ipsa loquitur* doctrine.

Wynn v. Smith

16 P.3d 424 (Nev. 2001)

Defamation verdict reversed and remanded for second trial because the district court erred by allowing an inaccurate malice jury instruction.

Wynn filed an action for defamation against Smith, Barricade Books, Inc., and Barricade Books' principal, Stuart, because of a statement published in an advertisement for Smith's unauthorized biography of Wynn. The trade catalog advertisement said the book "details why a confidential Scotland Yard report called Wynn the front man for the Genovese family." The district court granted summary judgment in favor of Smith. Wynn subsequently brought suit against Barricade Books and Stuart. The district court in the second suit entered judgment in favor of Wynn, totaling over \$3.3 million for costs, compensatory, and punitive damages. Wynn, Smith, Barricade Books, and Stuart appealed for different reasons.

Wynn appealed the summary judgment entered in favor of Smith, arguing Smith was the source of the statement and should be liable. The Nevada Supreme Court affirmed the lower court's judgment in favor of Smith after deciding that Smith only provided his manuscript to the other defendants and did not represent his opinions as facts in the advertisement.

Smith appealed the denial of attorney's fees, claiming the district court reached the wrong conclusion under the *Beattie* factors. According to *Beattie v. Thomas*, 668 P.2d 268 (Nev. 1983), the district court must evaluate specific factors when deciding on attorney's fees. While finding that the district court failed to specifically address each *Beattie* factor, the Nevada Supreme Court affirmed the judgment because there was no abuse of discretion.

Barricade Books and Stuart appealed the defamation judgment, claiming the fair report privilege afforded them protection from liability, the jury instruction on malice was improper, and the statement at issue was non-actionable because only statements of fact, not opinions, constitute defamation. The court refused to apply privilege under the fair report privilege because the report from Scotland Yard was not official. The court followed the Third Circuit's reasoning that unauthorized or confidential reports do not qualify as official reports. However, the court reversed and remanded the decision because the jury instruction on malice failed to qualify the degree of doubt required for malice, essentially reducing the required standard of proof: the instruction required a finding of "doubt" and should have required "serious doubt." Additionally, the court ordered that, on remand, the district court submit the question of the statement's factual nature to the jury for determination. The court remanded the matter for a new trial against Barricade Books and Stuart.

Justice Leavitt voluntarily recused himself.

Justice Becker concurred, but expressed disagreement with the court's "serious doubt" standard and a preference for the United States Supreme Court's standard imposed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).