The Public Lawyer

STATE BAR OF NEVADA

Nevada Supreme Court Cases

BMW v. Roth, 127 Nev. Adv. Op. No. 11 (April 14, 2011) The district court granted the new trial based on its finding that BMW's counsel repeatedly violated a pretrial order in limine. The order in limine grew out of Nevada's seatbelt statute. This statute requires adults riding in cars to wear seatbelts but adds that "A violation of [the statute is] not a moving traffic violation [and m]ay not be considered as negligence [or] misuse or abuse of a product or as causation in any [civil] action." NRS 484D.495(4). Because Roth claimed that she was wearing her seatbelt yet was ejected and suffered grave injury due to defects in the car's safety restraint system, the district court permitted BMW to defend with evidence and argument that Roth had not, in fact, been wearing her seatbelt. However, the court hedged this permission with a limiting instruction that told the jury it could consider the seatbelt evidence only in "evaluating [Roth's] claim[s] against BMW that the subject vehicle was defective and unreasonably dangerous," not "for any other purpose." The district court found BMW's counsel went out of these bounds in voir dire, opening statement, and closing argument, committing prejudicial misconduct that merited a new trial under *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

We reverse.

City of Reno v. Bldg. & Constr. Trades Council, 127 Nev. Adv. Op. No. 10 (March 31, 2011) Respondents Building & Construction Trades Council of Northern Nevada; Painters and Allied Trades, Local 567; International Brotherhood of Electrical Workers, Local 401; and Sheet Metal Workers International Association, Local 26 (collectively, the unions), representing workers on the construction of a retail store in Reno, filed complaints with the Labor Commissioner alleging that their workers did not receive prevailing wages on that project. Two of those unions[1] further alleged that appellant City of Reno had failed to fulfill

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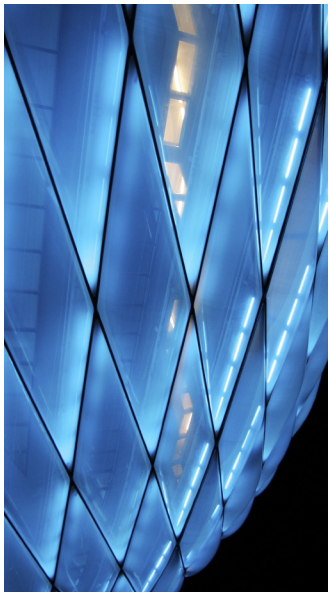

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its duty to investigate whether workers were receiving prevailing wages, a duty the unions contend the City had because the project was set to receive public financing in the form of sales tax anticipation revenue (STAR) bond funds.

The Labor Commissioner conducted a hearing and concluded that the City did not have a duty to investigate the prevailing wage claims, and that he lacked jurisdiction to hear the particular prevailing wage claims at issue. After the unions petitioned the district court for judicial review, the district court granted the petition and remanded the case to the Labor Commissioner, concluding that the City had a duty to investigate the prevailing wage discrepancies under NRS 338.070 and that the Labor Commissioner had jurisdiction to consider the claims.

We first consider whether the City had a duty to investigate the prevailing wage discrepancies. While the district court concluded that the City had a statutory duty to investigate, we conclude that the City had a contractual duty to investigate the prevailing wage discrepancies, and therefore, we do not consider the City's statutory duty. Second, we consider the effect on this case of our holding in Carson-Tahoe Hospital v. Building & Construction Trades, 122 Nev. 218, 128 P.3d 1065 (2006), which concerned applying the prevailing wage statutes to a different type of project. While Carson-Tahoe dealt with a related issue, because the projects involved in the two cases were financed by differing statutory modes, the facts are distinguishable. Lastly, we consider the City's remaining argument and conclude that the Labor Commissioner has jurisdiction to ensure prevailing wages are paid on projects receiving STAR bond funds.[2] Thus, while we do not completely agree with the district court's reasoning for why the City had a duty to investigate the prevailing wage discrepancies, we nonetheless affirm its order.

Picardi v. Eighth Judicial Dist. Court, 127 Nev. Adv. Op. No. 9 (March 31, 2011) In this petition for extraordinary writ relief, we consider whether an arbitration agreement is unenforceable because it is unconscionable or contrary to public policy when it requires consumers to waive their rights to participate in any form of class action litigation to pursue common claims that they may have concerning a retail installment sales contract. In the district court, petitioners' arguments were rejected, and the court entered an order compelling petitioners to participate in binding arbitration and prohibiting them from taking part in any class action proceeding against real party in interest.

Nevada public policy favors allowing consumer class action proceedings when the class members present common legal or factual questions but their individual claims may be too small to be economically litigated on an individual basis. We conclude that a clause in a contract that prohibits a consumer from pursuing claims through a class action, whether in court or through arbitration, violates Nevada public policy. Because the class action waiver provision in this matter precludes any form of class action relief, it is contrary to public policy and is therefore unenforceable. Here, because the terms of the arbitration agreement provide that it is void if the class action waiver is found unenforceable, there is no basis on which to compel arbitration.[1] Accordingly, the district court abused its discretion in compelling arbitration, and writ relief is warranted.

Western Surety Co. v. ADCO Credit Inc., 127 Nev. Adv. Op. No. 8 (March 17, 2011) In this appeal, we consider whether Nevada's motor vehicle bond statute, NRS 482.345, includes defrauded finance companies as possible claimants under the bond. We conclude that under the

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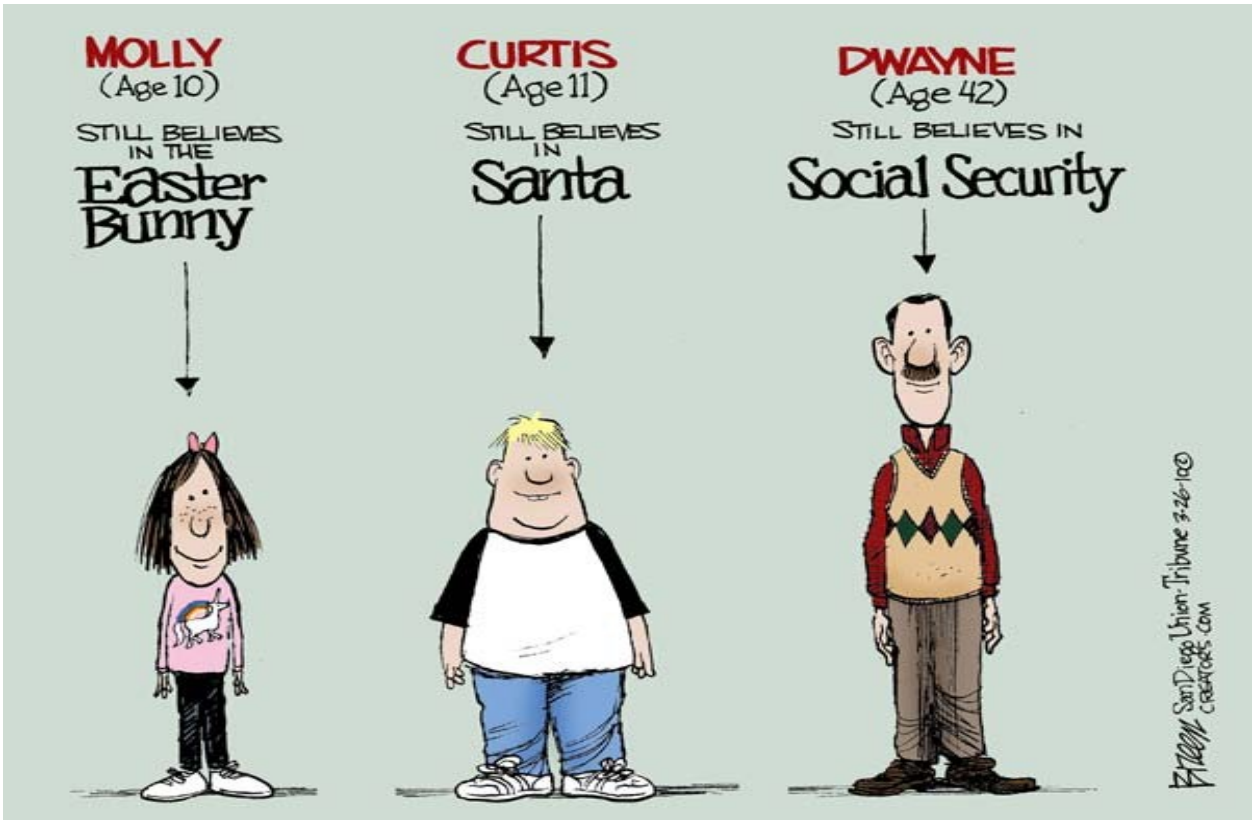
plain meaning of the phrase "any person" in NRS 482.345, a defrauded finance company is a proper claimant under the dealer bond and, thus, the district court properly granted respondent ADCO Credit, Inc.'s petition for judicial review

State v. Lucero, 127 Nev. Adv. Op. No. 7 (March 17, 2011) A conviction for level-three trafficking in a controlled substance results in a mandatory minimum prison term of 10 years pursuant to NRS 453.3385(3), unless the defendant renders substantial assistance to law enforcement pursuant to NRS 453.3405(2). Under the substantial-assistance exception, the district court has discretion to reduce or suspend the mandatory minimum sentence if it determines that the defendant rendered substantial assistance. In this appeal, we consider whether the district court has the authority to reduce the 10-year minimum sentence prescribed by NRS 453.3385 when revoking probation pursuant to NRS 176A.630 for a defendant who previously received a suspended sentence because he rendered substantial assistance. We conclude that the phrase "minimum term of imprisonment prescribed by the applicable penal statute" in NRS 176A.630, which limits the extent to which a district court can reduce the term of imprisonment upon revocation of probation, is ambiguous when applied to NRS 453.3385 in cases where a defendant has rendered substantial assistance. Because the general rules of statutory construction do not resolve that ambiguity, we apply the rule of lenity and conclude that the district court had the authority to reduce the defendant's sentence after it revoked his probation.



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Urine Sample Collector Will Be 'Directly Observing the Urine Coming Straight Out of Your Body,' Thank You Very Much

There are some times that a man simply does not want to have a stranger "directly observe the urine coming straight out of his body." Am I right, men? Is it really necessary to require a guy to provide a urine sample in a fashion that allows the "collector" of this test to have constant "visibility of the participant's genitalia?"
*[**Sidenote**: It now occurs to me that the following conversation has probably taken place at some point in history:*
Q: What do you do for a living?
A: I'm a collector.
Q: What do you collect?
A: Urine samples.]

Moving on. Via **How Appealing** I see that on Wednesday, a three-judge panel of the 6th U.S. Circuit Court of Appeals **held** that if a urine sample collection company wants to have a rule that its collectors shall directly observe the urine coming straight out of a man's body, with visibility of that man's genitalia, well, that is just fine with the 6th Circuit.

Was this "direct observation" an overly intrusive, unreasonable search under the Fourth Amendment? No sir, the 6th Circuit held, because the appellant had agreed to undergo drug testing and [t]he government had a strong-indeed, a compelling-interest in insuring the accuracy of the drug testing by preventing Norris from giving a false specimen.... The record shows that it is easy and widespread for people providing urine for drug testing to substitute false or inaccurate specimens and that only the direct observation method of obtaining such samples is fully effective "to prevent cheating on drug tests," in the language of the district court. Neither the Kentucky authorities nor Premier acted improperly in requiring that method.

Thursday's Three Burning Legal Questions

Here are today's three burning legal questions, along with the answers provided by the blogosphere.

1) Question: I'm not going to lie, I *reallllly* like to gamble. Too much, probably. But hey, sometimes it is all worth it, like right now when I just won a $2,001 jackpot! W00t!! Just curious, but does it matter that, prior to hitting the jackpot, I had previously banned myself from the state's casinos under a Gaming Control Board self-help program?

Answer: Oh yes, it matters. Not only do you not get to keep the money, you will also likely face a criminal trespass charge. (Legal Juice, So I Can't Keep The $2,001 Jackpot I Won?)

2) Question: I'm drunk and the cops are following my car. Is it true that if I run into the forest and strip off my clothes that I will then "conceal my scent" so the K-9 dogs will not be able to find me?

Answer: That is not true. Sorry. (Jalopnik, This woman stripped to "conceal her scent" from K-9s after a DUI)

3) Question: Hey, I got that Ecko "rhino" tattoo so I can get the lifetime 20 percent discount but just realized that the offer was made on April Fool's Day. Am I stuck with this rhino and no

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discount?

Answer: No, you are in luck! That offer was no joke. (Consumerist, Ecko Is Totally, 100% Serious About The Discounts-For-Tattoos Deal)

Unites States v. Arizona, No. 10-16645 (April 11, 2011) In April 2010, in response to a serious problem of unauthorized immigration along the Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy. Support Our Law Enforcement and Safe Neighborhoods Act, as amended by H.B. 2162 ("S.B. 1070"), "make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers.

Before Arizona's new immigration law went into effect, the United States sued the State of Arizona in federal district court alleging that S.B. 1070 violated the Supremacy Clause on the grounds that it was preempted by the Immigration and Nationality Act ("INA"), and that it violated the Commerce Clause. Along with its complaint, the United States filed a motion for injunctive relief seeking to enjoin implementation of S.B. 1070 in its entirety until a final decision is made about its constitutionality. Although the United States requested that the law be enjoined in its entirety, it specifically argued facial challenges to only six select provisions of the law. *United States v. Arizona*, 703 F. Supp. 2d 980, 992 (D. Ariz. 2010). The district court granted the United States' motion for a preliminary injunction in part, enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6, on the basis that federal law likely preempts these provisions. *Id.* at 1008. Arizona appealed the grant of injunctive relief, arguing that these four sections are not likely preempted; the United States did not cross-appeal the partial denial of injunctive relief. Thus, the United States' likelihood of success on its federal preemption argument against these four sections is the central issue this appeal presents.

We have jurisdiction to review the district court's order under 28 U.S.C. § 1292(a)(1). We hold that the district court did not abuse its discretion by enjoining S.B. 1070 Sections 2(B), 3, 5(C), and 6. Therefore, we affirm the district court's preliminary injunction order enjoining these certain provisions of S.B. 1070.

The Facebook, Inc. v. Connectu, Inc., No. 08-16745 (April 11, 2011) Cameron Winklevoss, Tyler Winklevoss and Divya Narendra (the Winklevosses) claim that Mark Zuckerberg stole the idea for Facebook (the social networking site) from them. They sued Facebook and Zuckerberg (Facebook) in Massachusetts. Facebook countersued them and their competing social networking site, ConnectU, in California, alleging that the Winklevosses and ConnectU hacked into Facebook to purloin user data, and tried to steal users by spamming them. The ensuing litigation in-

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volved several other parties and gave bread to many lawyers, but the details are not particularly relevant here.

The district court in California eventually dismissed the Winklevosses from that case for lack of personal jurisdiction. It then ordered the parties to mediate their dispute. The mediation session included ConnectU, Facebook and the Winklevosses so that the parties could reach a global settlement. Before mediation began, the participants signed a Confidentiality Agreement stipulating that all statements made during mediation were privileged, non-discoverable and inadmissible "in any arbitral, judicial, or other proceeding."

After a day of negotiations, ConnectU, Facebook and the Winklevosses signed a handwritten, one-and-a-third page "Term Sheet & Settlement Agreement" (the Settlement Agreement). The Winklevosses agreed to give up ConnectU in exchange for cash and a piece of Facebook. The parties stipulated that the Settlement Agreement was "confidential," "binding" and "may be submitted into evidence to enforce [it]." The Settlement Agreement also purported to end all disputes between the parties.

The settlement fell apart during negotiations over the form of the final deal documents, and Facebook filed a motion with the district court seeking to enforce it. ConnectU argued that the Settlement Agreement was unenforceable because it lacked material terms and had been procured by fraud. The district court found the Settlement Agreement enforceable and ordered the Winklevosses to transfer all ConnectU shares to Facebook. This had the effect of moving ConnectU from the Winklevosses' to Facebook's side of the case.

The Winklevosses are not the first parties bested by a competitor who then seek to gain through litigation what they were unable to achieve in the marketplace. And the courts might have obliged, had the Winklevosses not settled their dispute and signed a release of all claims against Facebook. With the help of a team of lawyers and a financial advisor, they made a deal that appears quite favorable in light of recent market activity. *See* Geoffrey A. Fowler & Liz Rappaport, *Facebook Deal Raises $1 Billion*, Wall St. J., Jan. 22, 2011, at B4 (reporting that investors valued Facebook at $50 billion —3.33 times the value the Winklevosses claim they thought Facebook's shares were worth at the mediation). For whatever reason, they now want to back out. Like the district court, we see no basis for allowing them to do so. At some point, litigation must come to an end. That point has now been reached.

Karuk Tribe v. United States Forest Serv., No. 05-16801 (April 7, 2011) Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), requires interagency consultation for any federal agency action that may affect a listed species. In this opinion, we determine whether a United States Forest Service (USFS) District Ranger's (Ranger) decision that a proposed mining operation may proceed according to the miner's Notice of Intent (NOI) and will not require a Plan of Operations (Plan) is an "agency action" for purposes of triggering the ESA's interagency consulting obligations.

We hold that the NOI process does not constitute an "agency action," as that term is defined under the ESA. The Ranger's receipt of an NOI and resulting decision not to require a Plan is most accurately described as an agency decision *not* to act. Because " 'inaction' is not 'action' for section 7(a)(2) purposes," *W. Wa-*

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tersheds Project v. Matejko, 468 F.3d 1099, 1108 (9th Cir. 2006), we affirm the district court's denial of summary judgment on the Tribe's ESA challenge to the NOI process.

Gardner v. Bureau of Land Management, No. 09-35647 (April 7, 2011) Plaintiffs-Appellants Fred Gardner and Concerned Citizens for Little Canyon Mountain (sometimes collectively Gardner) brought suit for declaratory and injunctive relief pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, seeking to compel Defendant-Appellee United States Bureau of Land Management (BLM) to prohibit off-road vehicle use of Oregon's Little Canyon Mountain area. The district court granted summary judgment to the BLM. On appeal, Gardner asserts that the BLM's failure to close Little Canyon Mountain to off-road vehicle use violated the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785, and off-road vehicle regulations, 43 C.F.R. pts. 8340-8342.

We have jurisdiction under 28 U.S.C. § 1291. We affirm. We hold that the BLM did not, and was not required to, make a finding that the off-road vehicle use of which Gardner complains had caused "considerable adverse effects" on the resources enumerated under 43 C.F.R. § 8341.2(a) and, accordingly, we cannot compel the BLM to act to close Little Canyon Mountain to off-road vehicle use. We also hold that the BLM's denial of Gardner's petition to close Little Canyon Mountain to off-road vehicle use was not arbitrary and capricious.

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A.D. v. State of California Highway Patrol, No. 09-16460 (April 6, 2011) California Highway Patrol Officer Stephen Markgraf appeals the judgment following a jury trial in favor of A.D. and J.E. on their claim under 42 U.S.C. § 1983 that Markgraf violated their Fourteenth Amendment right to a familial relationship when he shot and killed their mother, Susan Eklund, at the end of a high-speed chase. The district court denied Markgraf's motions for summary judgment and judgment as a matter of law on the ground of qualified immunity. While we decline to review the ruling on summary judgment, we believe Markgraf is entitled to qualified immunity. Accordingly, we reverse on this issue. Markgraf separately appeals the award of attorneys' fees, which we vacate in light of our disposition on the merits.

Nothing in the universe of cases prior to Markgraf's conduct would have alerted him that his split-second decision in dealing with someone who had just led police on a dangerous high-speed chase and who was using her car as a weapon shocked the conscience. For these reasons we conclude that Markgraf is entitled to qualified immunity.

California Shock Trauma Air Rescue v. State Compensation Insur. Fund, No. 09-16810 (March 31, 2011) These consolidated appeals arise from two separate actions that involve California Shock Trauma Air Rescue (CALSTAR). Both actions turn on the same jurisdictional question: is the expectation of a federal defense, without more, sufficient to establish federal jurisdiction over a state-law claim? Despite CALSTAR's arguments to the contrary, we reiterate that the well-pleaded complaint rule precludes the exercise of federal subject matter jurisdiction over purely state-law causes of action, like the one raised here.

Robidoux v. Rosengren, No. 09-16674 (March 30, 2011) This case calls upon us to determine the proper scope of review for a district court considering whether a proposed settlement of housing discrimination claims involving minor plaintiffs is fair and reasonable. Plaintiffs- Appellants— including minors and their guardians *ad litem*—appeal the district court's denial, in part, of their motion to approve a proposed settlement of Plaintiffs' housing discrimination claims against their former landlords, Wayne and Eileen Wacker ("Defendants"). The district court, exercising its special duty to protect the interests of litigants who are minors, rejected the settlement, as proposed, because the district court found the designation of 56% of the total settlement value to Plaintiffs' counsel "excessive" and unreasonable. The district court then reduced Plaintiffs' counsel's award from $135,000.00 to $77,166.42 in fees and $8,500.73 in costs and approved the modified settlement. *Id*. at 6.

We reverse. Although the district court has a special duty to safeguard the interests of minor plaintiffs, that duty requires only that the district court determine whether the *net amount* distributed to each minor plaintiff in the proposed settlement is fair and reasonable, without regard to the proportion of the total settlement value designated for adult co-Plaintiffs and contracted by them with Plaintiffs' counsel. If the net recovery of each minor plaintiff under the proposed settlement is fair and reasonable, the district court should approve the settlement as proposed.

Islamic Shura Council of Southern California v. Federal Bureau of Investigation, No. 09-56035 (March 30, 2011) In this Freedom of Information Act ("FOIA") case, the govern-

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ment brings an interlocutory appeal challenging the district court's sealed, *ex parte* order ("Sealed Order") containing the district court's decision to make all of its contents public. The government contends that the Sealed Order contains some sensitive national security and law enforcement information. The district court was justifiably annoyed with the government's withholding of documents from the plaintiffs and the court. The withholding misled the court into believing the government had complied with all its statutory obligations under the FOIA. It was not until the court convened *ex parte*, *in camera* proceedings that it learned of the existence of additional documents which were responsive to the plaintiffs' FOIA requests. We do not necessarily endorse the government's conduct during the litigation, but we agree with the government that the Sealed Order contains information that should not become public. We therefore vacate the Sealed Order and remand for its revision in further proceedings.

Bardzik v. County of Orange, No. 09-55103 (March 28, 2011) Plaintiff Jeffrey Bardzik was a lieutenant in the Orange County Sheriff's Department under the command of Defendant Sheriff Michael Carona. Bardzik sues Carona under 42 U.S.C. § 1983, alleging that Carona violated Bardzik's First Amendment right to free speech by retaliating against Bardzik for supporting Carona's opponent in the 2006 Sheriff's election. Bardzik argues that Carona retaliated against him by transferring him from the prestigious position of Reserve Division Commander to an undesirable post at Court Operations. Bardzik also argues that Carona continued punishing him even after he was transferred. Before the district court, Carona moved for summary judgment, arguing that he was permitted to retaliate against Bardzik for his political activities because Bardzik was a "policymaker" under *Branti v. Finkel*, 445 U.S. 507 (1980), or, at the very least, that Carona was entitled to qualified immunity for his actions. Carona argued that Bardzik was a policymaker because Bardzik was Reserve Division Commander in charge of over 600 reserve officers and because Bardzik proposed and implemented large policy changes in the Reserve Division. The district court denied Carona's motion, and Carona appeals the qualified immunity determination.

We hold that Carona is entitled to qualified immunity for his actions retaliating against Bardzik while Bardzik was Reserve Division Commander because Bardzik was a policymaker in that position. Carona is not entitled to qualified immunity, however, for any further retaliatory action against Bardzik once Bardzik was transferred to Court Operations. Under clearly established law, Bardzik was not a policymaker at Court Operations. We affirm in part and reverse in part.

C.B. v. Garden Grove Unified School Dist., No. 09-56588 (March 28, 2011) After the Garden Grove Unified School District ("District") repeatedly failed to provide a free appropriate public education to student C.B., as required by the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482, his aunt and guardian ("Guardian") enrolled C.B. in a nonpublic program, the Reading and Language Center ("Center"). Guardian sought reimbursement for the full cost of sending C.B. to the Center. An administrative law judge ("ALJ") found that C.B. received significant educational benefits from attending the Center. But, because the ALJ found that the Center did not meet all of C.B.'s educational needs, he awarded only half of the reimbursement sought. Guardian filed this action, as a result of which the district court awarded full reimbursement.

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We affirm, because the statute does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement.

Colony Cove Properties, LLC v. City of Carson, No. 09-57039 (March 28, 2011) Colony Cove Properties, LLC ("Colony Cove") appeals from the district court's dismissal of its federal claims filed pursuant to 42 U.S.C. § 1983, and its state law claim seeking a writ of administrative mandate pursuant to Cal. Civ. Pro. Code § 1094.5. Colony Cove contends that the City of Carson's 1979 mobilehome rent control ordinance, and its implementing guidelines as they stood after the adoption of a 2006 amendment, deprive mobilehome park owners of the value of their property and transfer it to park residents, who are able to sell their mobilehomes at a premium because they are located on rent-controlled spaces. Colony Cove asserts facial and as applied challenges to the ordinance and amended guidelines as violative of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause.

The district court dismissed Colony Cove's facial takings claim as time-barred, its as applied takings claim as unripe, and its as applied due process claim for failure to state a claim; the district court declined to exercise supplemental jurisdiction over Colony Cove's related state law claim. After reviewing the briefs and the record, we are persuaded that the district court did not err in dismissing this action.

Young v. City and County of Honolulu, No. 09-16034 (March 22, 2011) We are called upon to decide whether the City of Honolulu violated the Contracts Clause of the United States Constitution when it repudiated several agreements to convey property to private citizens in connection with its leasehold conversion program.

Lessees contend that it is unreasonable to read the Agreements to permit the City to repeal Chapter 38, as such leeway would render the entire contract illusory. Specifically, Lessees argue that this interpretation would allow the City unilaterally to change the terms of the Agreements, and thus fails to bind the City to any obligations. Under such a reading, the contracts would be void for lack of mutuality of consideration. *See Douglass v. Pflueger Haw., Inc.*, 135 P.3d 129, 144 (Haw. 2006).

But the Agreements impose several obligations upon the City, even if the City is not required ultimately to condemn Lessees' property. For example, upon a proper application, the DCS must—as it did—conduct preliminary hearings to assess the public necessity of condemnation. If preliminary approval is given, the City Council must—as it did—consider whether condemnation will serve the public interest. Moreover, if the City Council *were* to find condemnation appropriate, and eminent domain proceedings were successful, the City would be obligated to transfer ownership of the relevant properties to Lessees. These are significant and binding contractual obligations, and thus the Agreements are well supported by mutual consideration. The Repeal Ordinance did not breach any of these obligations, and it therefore did not impair the City's contractual relationships with the Lessees.

Hayes v. County of San Diego, No. 09-55644 (March 22, 2011) On the night of September 17, 2006, Shane Hayes was shot and killed inside his home by San Diego County Sheriff's Deputies Mike King and Sue Geer. Hayes's

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minor daughter filed suit against the deputies and the County of San Diego, alleging state and federal claims stemming from the incident. The district court granted Defendants summary judgment on all claims, and Plaintiff timely appealed. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

For the foregoing reasons, we reverse the district court's finding that Chelsey Hayes has standing to assert survival claims related to her father's Fourth Amendment rights and remand for further proceedings on the issue, including whether Appellant has standing to assert a *Monell* claim against the County on this basis. We affirm the summary judgement as to Appellant's § 1983 claim based on a violation of her rights under the Fourteenth Amendment, as well as the *Monell* claim stated against the County on the same basis. We reverse the summary judgement on Appellant's negligent wrongful death claim and remand for further proceedings on this claim.

Hunt v. City of Los Angeles, Nos. 09-55750 (March 22, 2011) The Venice Beach Boardwalk (the "Boardwalk"), located on the west side of Los Angeles, is world-famous for its free performances and public expression activities. Due to overcrowding, safety concerns, and to promote local businesses in the area, the City of Los Angeles (the "City") has implemented a number of ordinances aimed at preventing vending on the Boardwalk, including Los Angeles Municipal Code ("LAMC") § 42.15 (2004), LAMC § 42.15 (2006), and LAMC § 63.44. Although none of these ordinances is still in effect, Michael Hunt ("Hunt") and Matthew Dowd ("Dowd") (collectively, "Plaintiffs"), who sell items on the Boardwalk, have brought claims for damages pursuant to 42 U.S.C. § 1983, arguing a panoply of reasons why these ordinances are unconstitutional.

The City appeals the district court's grant of summary judgment in favor of Hunt as to LAMC § 42.15 (2004) and the subsequent damages and attorneys' fee awards, while Plaintiffs cross-appeal the district court's grant of summary judgment to the City as to LAMC § 42.15 (2006) and failure to consider the constitutionality of LAMC § 63.44. Based on the following, we AFFIRM the district court's findings as to both versions of LAMC § 42.15, and REMAND for the district court to address LAMC § 63.44 in the first instance.

Smith v. Almada, Nos. 09-55334 (March 21, 2011) Plaintiffs Anthony Smith and his wife Theresa Smith appeal the district court's grant of summary judgment to Defendant Santa Monica Police Sergeant Robert Almada on Smith's claims for false arrest, malicious prosecution, and suppression of exculpatory evidence and on Theresa Smith's substantive due process claim for deprivation of familial relations. In support of his action against Almada, Smith claims that Sergeant Almada failed to disclose materially exculpatory evidence in Smith's criminal arson trial—including a false identification by a key witness that Smith was gloating at the arson scene in the months following the fire. Although Smith's first trial resulted in a mistrial after the jury was unable to reach a verdict, he says that access to the exculpatory evidence would have caused the judge not to issue an arrest warrant or would have resulted in an acquittal. We have jurisdiction under 28 U.S.C. § 1291, and we affirm after finding that the arguably non-disclosed evidence would not have resulted in a different outcome.

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Gerhardt v. Lake County Montana, No. 10-35183 (March 18, 2011) Plaintiff-appellant Allan Gerhart is a property owner and resident of Lake County, Montana. In 2007, Gerhart built an approach to Juniper Shores Lane, a county road that borders his property. Around the time Gerhart constructed his approach, he was informed by a County employee that the County requires permits for road approaches. Gerhart filed an approach permit application, which was denied by the County Commissioners. This denial was remarkable because, according to Gerhart's undisputed testimony, at least ten other property owners on his block previously built un-permitted approaches to Juniper Shores Lane, all without consequence. Moreover, the deposition testimony of the County Commissioners indicated that outright denial of an approach permit application was rare, if not unprecedented. After the Commissioners denied Gerhart's permit application, he brought suit under 42 U.S.C. § 1983, alleging that the County and the individual Commissioners violated his due process and equal protection rights. The district court granted summary judgment to Defendants after concluding that Gerhart could not establish a constitutional violation.

We affirm the district court's grant of summary judgment to the County. We also affirm the dis-

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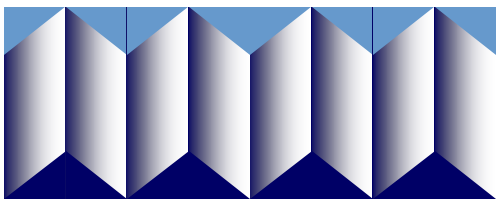
trict court's grant of summary judgment to the individual Commissioners on Gerhart's due process claims, but reverse the district court's grant of summary judgment to the individual Commissioners on Gerhart's equal protection claim. As to that claim, we conclude that on the basis of the summary judgment record, a reasonable trier of fact could find that the Commissioners violated Gerhart's equal protection rights and that the Commissioners are not entitled to qualified immunity.

Sanders v. Cityof Newport, No. 08-35996 (March 17, 2011) Diane Sanders, a former employee of the City of Newport ("the City"), sued the City when it refused to reinstate her after she took an approved medical leave. In her complaint, Sanders alleged that the City violated the Family and Medical Leave Act of 1993 ("FMLA"), the Oregon Family Leave Act ("OFLA"), and other state and federal laws when it failed to reinstate her after she took FMLA/OFLA leave, and ultimately fired her. At trial, the City argued that it could not provide a safe workplace for Sanders because she suffered from multiple chemical sensitivity. In a bifurcated trial, a jury decided Sanders's FMLA and other damages claims, while the court decided Sanders's claims for equitable relief under OFLA. The jury returned its verdict in favor of the City, finding that the City did not violate Sanders's FMLA rights. On the basis of the same evidence presented to the jury, the court concluded that the City violated Sanders's OFLA rights and awarded monetary relief. Both Sanders and the City timely appealed. In her appeal, Sanders argues that the court improperly instructed the jury on the elements of her FMLA interference claim. Sanders further argues that the instructional error was not harmless and therefore she is entitled to a new trial. In its appeal, the City argues that the court was bound by the jury's implicit factual findings that it made in rendering a verdict for the City on Sanders's FMLA claim. The City thus argues that it is entitled to judgment on Sanders's OFLA claim.

For the reasons explained below, we agree with Sanders that the trial court improperly instructed the jury on the elements of her FMLA interference claim and that the error was not harmless. We therefore reverse the judgment as to this claim and remand for a new trial. Because the jury was improperly instructed, we vacate the judgment on Sanders's OFLA claim and remand it for further consideration after the retrial of her FMLA claim.

Paiute-Shoshone Indians v. City of Los Angeles, No. 07-16727 (March 14, 2011) Plaintiff Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California, an Indian tribe formally recognized by the United States, filed this action against Defendant City of Los Angeles for an order restoring Plaintiff to possession of land that the City took long ago in a deal with the United States. The district court dismissed the action under Federal Rule of Civil Procedure 12(b)(7) because it ruled that, under Rule 19 of the Federal Rules of Civil Procedure, the United States was a required party that Plaintiff could not join. The district court certified the appealability of its order under 28 U.S.C. § 1292(b). Upon Plaintiff's timely request, we agreed to hear this interlocutory appeal, and we now affirm.



ADA

EEOC releases new regulations for the Americans with Disabilities Act

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April 7 2011

On March 25, 2011, the EEOC issued its long-awaited regulations under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Like the ADAAA, the regulations focus on making it significantly easier for an individual to qualify for the protections of the Americans with Disabilities Act ("ADA"). The content of the regulations, and of the revamped Interpretative Guidance published at the same time, largely track that of the ADAAA. The regulations will become effective on May 24, 2011.

Background

The ADAAA broadened the class of individuals protected by the ADA without changing the statutory definition of "disability." An individual with a protected disability remains one who (1) has an actual disability, (2) has a record of having a disability, or (3) is regarded as having a disability. Also as before, for purposes of the first two prongs of this definition, disability is defined as a physical or mental impairment that "substantially limits" a "major life activity." The principal changes effected by the ADAAA are to the concepts of "substantially limits" and "major life activity" and to the requirements for the "regarded as" prong of the definition, all of which were made considerably easier to satisfy.

In the ADAAA, Congress repudiated the Supreme Court's and the EEOC's definitions of "substantially limits" as too restrictive.1 It directed that a court's primary focus in an ADA case should be on whether an employer has complied with its obligations, and that whether an individual satisfies the definition of disability should not demand extensive analysis. Congress also expressed its expectation that the EEOC would revise its regulations so that their meaning for the term "substantially limits" would be consistent with the ADAAA.

Relaxed Standard for "Substantially Limits"

In its new regulations the EEOC has declined to provide a new definition of the term "substantially limits," explaining that "a new definition would . . . lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress." Instead, the regulations provide nine rules of construction to be applied in determining whether an impairment "substantially limits" a major life activity. Most of the rules come directly from the language of the ADAAA, but several have been added by the EEOC. The rules are the following:

1. "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."
2.
3. The determination of whether an impairment is "substantially limiting" should be made by comparing the ability of an individual to the general population. The impairment does not need to "prevent, or significantly or severely restrict" the performance of a major life activity.

4. The "threshold issue" of substantially limits should not require extensive analysis, and the focus should be on whether the employer has complied with its statutory obligations.

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5. The determination requires an "individualized assessment," but the assessment should be done by requiring "a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."
6. Comparing an individual to the general population should not generally require scientific, medical, or statistical analysis.
7. The determination should be made without regard to the ameliorative effect of mitigating measures other than ordinary contact lenses and eyeglasses.
8. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
9. An impairment need not limit more than one major life activity.

"The effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting."

The statement that the determination of whether an impairment causes an individual to be "substantially limited" requires an "individualized assessment" is of interest because in its earlier proposed regulations the EEOC appeared to be saying that certain conditions per se met the definition of disability. This position seemed inconsistent with the underlying premise of the ADA that individuals with disabilities should not be stereotyped. Although the EEOC has retreated somewhat from the position of the proposed regulations, the final regulations state that the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under either the first prong (actual disability) or the second prong (record of disability) of the definition of disability. The regulations provide a list of examples of such impairments, including: deafness substantially limits hearing; blindness substantially limits seeing; mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; cancer substantially limits normal cell growth; diabetes substantially limits endocrine function; epilepsy and multiple sclerosis both substantially limit neurological function; HIV infection substantially limits immune function; epilepsy, multiple sclerosis and muscular dystrophy all substantially limit neurological function; and an intellectual disability, autism, cerebral palsy, major depressive disorder, bipolar disorder, post-traumatic stress disorder and schizophrenia all substantially limit brain function.

Also noteworthy is the rule that the effects of an impairment lasting or expected to last for six months or less can be substantially limiting. Prior to the ADAAA, most courts had taken the position that a temporary condition lasting just a few months did not qualify as an actual disability under the ADA. The regulations do state that not every impairment will constitute a disability within the meaning of the ADA. However, the Interpretative Guidance also states that while typically not covered, impairments that last only for a short period of time may be covered if sufficiently severe. The Interpretative Guidance also states by way of example that someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for "several months" is substantially limited in the major life activity of lifting.

Relevance of Condition, Manner and Duration

The regulations state that to determine whether an individual is "substantially limited" in a "major life activity," it may be useful in appropriate cases to consider the condition under or the manner in which an individual performs a major life activity and/or the duration of time it takes the individual to perform (or for which the individual can perform) the activity, as compared to most people in the general population.

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The EEOC instructs that in determining whether an individual has a disability under the actual disability or record of disability prong of the definition of disability, the focus should be on how a major life activity is substantially limited and not on what outcomes an individual can achieve. The regulations give the example of someone with a learning disability who may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort required to read, write or learn compared to most people in the general population.

Examples of facts that may be relevant to a condition, manner or duration analysis are the effort or time required or the pain experienced when performing a major life activity and the way an impairment affects the operation of a major bodily function. In addition, the "non-ameliorative" effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

The EEOC draws a clear distinction between facts that bear on condition, manner or duration, which it says may be considered in appropriate cases, and the nine rules of construction, which it says it is always necessary to consider in assessing whether an individual is "substantially limited" in a "major life activity."

Non-Exclusive List of Major Life Activities

The Purposes section of the ADAAA and the regulations both specifically reject the Supreme Court's interpretation of the term "major life activity" as limited to activities of central importance to a person's daily life and stress that the term "major" should not be interpreted as creating a demanding standard for disability. The ADAAA provides a non-exclusive list of activities that are encompassed by the term "major life activity."2 The regulations reiterate the list provided by Congress and add sitting, reaching and interacting with others as further examples of major life activities. The ADAAA also provides that the operation of a major bodily function qualifies as a major life activity and lists examples.3 The regulations add, as further examples, the functions of special sense organs and skin and functions of the genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems.

The regulations do not include any discussion of when an impairment will substantially limit the major life activity of working, an issue that had been the subject of considerable case law before the ADAAA. The Interpretative Guidance does discuss this issue, but notes that there will now be much less need to rely on working as a major life activity because under the new, broadened standard, an impairment that substantially limits the major life activity of working will in most cases also substantially limit some other major life activity.

Enhanced Importance of the "Regarded As" Prong

Another major change in the ADAAA that is a focus of the regulations is the reduced requirements for the "regarded as" prong of the definition of disability. The ADAAA reversed the majority of cases by providing that the requirement that an impairment "substantially limit" a "major life activity" does not apply to the "regarded as" prong of the definition of disability. Thus, that prong is satisfied whenever an employer regards an individual as having an impairment, even if the employer does not view the impairment as substantially limiting (and, when an actual impairment is at issue, even if

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the impairment in fact is not substantially limiting). While it is now easier for an individual to meet the "substantially limits" and the "major life activity" requirements of the first two prongs of the definition, in most cases it will be even easier to establish protection under the "regarded as" prong.

The ease of establishing that an individual is "regarded as" having a disability is very important for adverse treatment cases. While an employer has no obligation to provide reasonable accommodation to an individual who meets only the "regarded as" prong of the definition of disability – a point the regulations confirm – the ADA's proscription against disparate treatment applies fully to "regarded as" cases. Indeed, the new regulations expressly state that "where an individual is not challenging an employer's failure to make reasonable accommodation . . . , it is generally unnecessary to proceed under the actual disability or record of prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the regarded as prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment."

The ADAAA states that a person will not qualify as an individual "regarded as" having a disability if the impairment is "transitory [defined as having a duration of six months or less] and minor." (As noted above, an individual with an actual impairment may qualify for protection under the actual disability or record of disability prongs even if the duration of the condition is six months or less.) Although the language of the statute does not suggest this, the regulations state that the fact that an impairment is transitory and minor is a "defense," to be demonstrated by the employer. The defense applies only when an impairment is objectively transitory and minor. The fact that an employer incorrectly believed that an impairment was transitory and minor is irrelevant.

Lesson for Employers: The Interactive Process

In passing the ADAAA, Congress made clear that it wanted broader workplace protection for individuals with disabilities, with the focus on reasonable accommodation, not on whether an individual has a covered disability. While the regulations and Interpretative Guidance contain no big surprises, the focus on reasonable accommodation makes it particularly important that employers properly communicate with individuals seeking an accommodation to identify the individual's limitations and to identify and implement appropriate accommodations.

In this regard, the EEOC's earlier guidance describes "an informal, interactive process . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." In its previous guidance, the EEOC outlined four steps involved in the interactive process:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the individual . . . to ascertain the precise job-related limitations imposed by the . . . disability and how those limitations could be overcome with a reasonable accommodation;
3. In consultation with the individual . . . identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

Consider the preference of the individual . . .

and select and implement the accommodation that is most appropriate for both the employee and the employer. (The EEOC has acknowledged that when more than one accommodation would be effective, the employer may ultimately choose the one it prefers.)

Employers should ensure that they have identified which of their personnel have responsibility for addressing requests for an accommodation and that those persons are familiar with, and actually engage in, an interactive process when an individual makes such a request. In addition, H.R. professionals and supervisory personnel should be reminded of the importance of reasonable accommodation and of the procedures to be followed when an employee discloses an impairment and requests a reasonable accommodation.

Employers should also consider including in their equal employment policy the availability of reasonable accommodations for a protected disability and the identity of the contact for requesting an accommodation. In addition, H.R. personnel and supervisors should be educated about the liberalized definition of disability and the resulting need to be able to demonstrate a persuasive business reason for adverse employment decisions made as to individuals with physical or mental impairments that are not transitory and minor.

The full text of the new regulations, and the new Interpretative Guidance, is available from the EEOC's website, located at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm.

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Court Finds Company Acted Appropriately in Blocking Facebook Following Employee Complaint

Amira-Jabbar v. Travel Servs. Inc., 726 F.Supp.2d 77 (D. Puerto Rico July 28, 2010). In this racial discrimination litigation, the plaintiff argued the defendant was liable for an allegedly racist comment that an employee posted on Facebook as the defendant allowed its employees to post photos and comments on the website during company time for company purposes, and did not have a firewall or software in place to prevent employees from using the site. The defendant moved for summary judgment, asserting it was not responsible for the incident because it had no ownership or control over the Facebook account, and did not authorize the plaintiff's coworker to post comments. Finding the defendant responded promptly and appropriately by blocking site access for all office computers after receiving a complaint from the plaintiff, the court held the plaintiff's allegations were insufficient to establish a hostile work environment claim and granted summary judgment for the defendant.

Court Grants Motion to Compel Forensic Images of Flash Drives

Océ N. Am., Inc. v. MCS Servs., Inc., 2011 WL 197976 (D. Md. Jan. 20, 2011). In this intellectual property litigation, the plaintiff sought forensic images of flash (or thumb) drives alleged to contain copies of its proprietary software. Pursuant to an agreement among the parties, a neutral third party expert created the forensic images and subsequently destroyed the original drives. Opposing the motion, the defendant claimed the plaintiff requested the drives themselves – not the forensic images – and that the parties' agreement limited the scope of e-discovery. Rejecting the defendant's arguments, the court noted that parties have a continuing obligation to supplement discovery responses. Further, because the forensic images of the thumb drives contained the exact same information as the original media, the images were dis-

coverable. Finally, the court found the agreement did not express a specific intention to limit discovery and found no compelling reason to deny the plaintiff access to this important information.

Court Denies Discovery of Listserv and Social Media in Post-Trial Fee Dispute

Muniz v. United Parcel Serv., Inc., 2011 WL 311374 (N.D. Cal. Jan. 28, 2011). In this employment discrimination litigation, the plaintiff moved to quash the defendants' third party subpoena seeking additional documentation related to the plaintiff's previous motion for attorney fees. Among the documentation sought by the defendants were postings by the attorney on listservs and social media networks (including LinkedIn and Facebook). To demonstrate the relevancy of the demand, the defendants submitted postings from the attorney's Facebook page and listservs. Denying the defendants' request for this information, the court found the subpoena was not appropriately geared toward revealing information relevant to the fee dispute and ordered the postings submitted by the defendants to be removed from the record. The court also noted that the dispute had already "spiraled into the kind of 'wasteful and time consuming satellite litigation' that should not occur in…post-trial fee disputes."

Court Denies Stay of Discovery Proceedings Pending a Motion to Dismiss

Christou v. Beatport, LLC, 2011 WL 650377 (D. Colo. Feb. 10, 2011). In this antitrust litigation, one of the defendants moved for protective order staying all discovery pending the adjudication of its motion to dismiss. Opposing the motion, the plaintiff argued that if discovery did not proceed, information stored by nonparties would be lost or destroyed pursuant to automatic retention schedules, or might be archived and require increased costs to restore, ultimately resulting in delays and financial harm. In support of the motion, the defendant offered a hypothetical scenario to demonstrate that it, along with the court and nonparties, would be burdened by discovery proceedings, protracted discovery disputes and piecemeal litigation. Finding the defendant failed to provide specific demonstrations of fact to establish good cause, and that granting the motion would *cause* piecemeal litigation and run counter to the public interest, the court denied the protective order.

Court Adopts Default Judgment Recommendation for Egregious Discovery Abuses and Refers Case to U.S. Attorney's Office

Philips Elecs. N. Am. Corp. v. BC Tech., 2011 WL 677462 (D. Utah Feb. 16, 2011). In this intellectual property litigation, the defendant objected to the magistrate judge's recommendation that the court strike the defendant's answer, dismiss its counterclaims, enter a default judgment and refer the case to the U.S. Attorney's Office for investigation and criminal prosecution. Although conceding that it engaged in discovery violations, the defendant argued it merely followed its counsel's advice, was not responsible for the actions of its employees and had largely remedied any prejudice arising from the spoliation. Adopting the recommendation in full, the court found the defendant's destruction of at least 17,800 relevant documents, attempted cover-up of electronic deletions after a third court order and misrepresentations while under oath were prejudicial and interfered with the judicial process. In addition, the court determined the company was liable for the actions of the employees – largely upper management and executives – who destroyed evidence as a "company cannot act or have a mental state by itself." Finally, the court held both attorney fees and terminating sanctions were appropriate

given the egregious nature of the discovery abuses and upheld the referral to the U.S. Attorney's Office for perjury investigation.

Court Declines to Impose Sanctions Following Destruction by Defendants Themselves

Fed. Trade Comm'n v. First Universal Lending, LLC, 2011 WL 673879 (S.D. Fla. Feb. 17, 2011). In this Federal Trade Commission (FTC) investigation, the defendants sought to enjoin the prosecution, alleging they were unable to mount a defense due to the FTC's bad faith spoliation of the defendants' computer systems. After seizing the defendants' business, the FTC employed a third party to forensically image computers for use in its prosecution; however, the defendants did not inform the FTC about numerous servers. Believing all computers were imaged, the court-appointed receiver ordered all computers owned by the defendants to be wiped before being sold. Rejecting the defendants' argument that this loss was catastrophic to the case, the court determined that relevant information was available in hard copy and was stored via a third party cloud computing service. In denying the bad faith spoliation claim, the court also noted that the destruction was carried out by the defendants themselves and that the FTC did not have an obligation to preserve the evidence. Although acknowledging the loss presented additional challenges in mounting a case and defense, the court found the obstacles were not insurmountable and denied the motion.

Third Party Defendant Ordered to Show Cause Why It Should Not Be Held in Contempt on Account of Alleged Misrepresentations

Long v. Fairbank Farms, Inc., 2011 WL 722767 (D. Me. Feb. 17, 2011). In this discovery dispute, the defendants sought to compel production, impose sanctions and require a third party defendant to show cause why it should not be held in contempt of court for accessing documents designated as for "Attorneys' Eyes Only." Despite finding discovery violations relating to two of five categories of documents allegedly withheld or destroyed, the court declined to impose sanctions or compel production as extraordinary relief had already been granted in a previous order permitting mirror-imaging. Regarding the next issue, attorneys for the third party defendant claimed they erroneously disseminated materials to their client marked "Attorneys' Eyes Only," pulled the documents back and confirmed the client had not since accessed them. However, the defendants produced evidence that a separate copy of the disclosure file was created and accessed using a USB storage drive on at least two occasions, and the file had been transferred to an iPod or iPhone. In light of this evidence, the court ordered the third party defendant to show cause as to why it should not be held in contempt on account of the alleged misrepresentations.

Court Orders Retention of Consultant to Repair Repeated and Continued Discovery Failures

Seven Seas Cruises S. DE R.L. v. V. Ships Leisure SAM, No. 1:09-cv-23411-UU (S.D. Fla. Feb. 19, 2011). In this breach of contract dispute, the plaintiffs requested sanctions and production, alleging the defendants intentionally and continuously failed to produce all responsive ESI. The defendants conceded not all relevant ESI was produced, noting that "in hindsight, an E-discovery consultant/vendor should have been retained." However, the defendants argued that they had agreed to re-run recent searches, that they would run searches on additional custodians identified by the plaintiffs and that the plaintiffs had access to much of the information via copies of correspondence be-

tween the parties. Noting that much of the dispute could have been significantly narrowed if not totally avoided through a pre-trial conference, the court agreed the defendants' searches were wholly inadequate and found their failure inexcusable. Accordingly, due to their repeated failure to conduct full and complete ESI searches, and the failure to retain a consultant to conduct such searches, the court ordered the defendants to utilize a third party vendor and pay the associated attorney fees and costs. The court declined to recommend default judgment, finding a lack of bad faith and no non-speculative evidence of prejudice.

Court Bars Introduction of and Reliance on Relevant Documents Not Timely Produced

Techsavies, LLC v. WDFA Mktg. Inc., 2011 WL 723983 (N.D. Cal. Feb. 23, 2011). In this discovery dispute, the plaintiff requested sanctions alleging the defendant failed to both timely produce documents and respond to an interrogatory. Despite the plaintiff's multiple complaints that the first production of 32,000 documents was incomplete, the defendant did not produce approximately 120,000 additional responsive documents until after discovery closed, claiming it "moved offices and simply forgot about them." Agreeing the defendant was on notice of its inadequate responses, the court found the defendant had an affirmative duty to investigate but failed to do so in a timely manner. Further, the defendant did not seek leave of the court before correcting its production. Concluding the defendant was unable to show its conduct was substantially justified or harmless, the court held sanctions were appropriate; however, the court also noted that the plaintiff contributed to the problems as it never moved to compel discovery. Thus, the court barred the defendant from introducing and relying on any untimely produced documents and ordered the parties to meet and confer regarding this issue.

Defendant Sanctioned for Unreasonable Discovery Efforts; Required to File Order in Past and Future Lawsuits

Green v. Blitz U.S.A., Inc., 2011 WL 806011 (E.D. Tex. Mar. 1, 2011). In this products liability litigation, the plaintiff sought to re-open the case and requested sanctions alleging the defendant systematically destroyed evidence, failed to produce relevant documents and committed other discovery violations in bad faith. The plaintiff's counsel uncovered the unproduced documents nearly a year after trial while conducting discovery in a related matter. Analyzing the dispute, the court determined the e-mails that were not produced, were extremely valuable and prejudiced the plaintiff. The court found the defendant's discovery efforts were unreasonable, as the defendant placed a single employee who was admittedly "as computer literate —illiterate as they get" in charge. Moreover, the defendant did not conduct a search of electronic data, failed to institute a litigation hold, instructed employees numerous times to routinely delete information and rotated its backup tapes repeatedly, which resulted in permanently deleting data. Although the court declined to re-open the case, it ordered the defendant to pay $250,000 in civil contempt sanctions. Additionally, the court imposed a "purging" sanction of $500,000, extinguishable if the defendant furnished a copy of the order to every plaintiff in every lawsuit proceeding against it for the past two years. Finally, the court ordered the defendant to file a copy of the order with its first pleading or filing in all new lawsuits for the next five years.

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LBW Practice Tip of the Day: Don't Copy Your 'Statement of Law' From Wikipedia

Via the Legal Writing Prof Blog, I stumbled upon a decision in *U.S. v. Karen Sypher* (Sypher ... Sypher ... where have I heard that name before? Oh yes, this lovely lady).

Beyond the attempted extortion of University of Louisville men's basketball coach Rick Pitino, which led to a seven-year sentence for Sypher, the case provides the LBW practice tip of the day: When briefing a legal issue in federal court, do not simply copy your statement of the law from a page on Wikipedia.

So says U.S. District Judge Charles R. Simpson III, who dropped an interesting footnote on this topic in his Feb. 9, 2011, opinion denying Sypher's motion for extension of time, motion for new trial, motion for Rule 11 sanctions and other evidentiary motions. In his footnote 4, Simpson compared Sypher's motion with the Wikipedia entry for *Strickland v. Washington*, and "remind[ed] counsel that such cutting and pasting, without attribution," is (a) plagiarism and (b) professional misconduct under the Kentucky Rules of Professional Conduct.

Judge Simpson added that he also wished to remind counsel that "Wikipedia is not an acceptable source of legal authority in the United States District Courts."

400-Pound Would-Be Shoplifter Unable to Flee on Motorized Scooter

Think back to when you were a wide-eyed child. You had big dreams. The world was your oyster! You never, *never*, thought for a second that someday the local paper in your town would have a headline referring to you **that read**,

"400-pound woman caught shoplifting when motorized cart gets stuck at Rochester Hills Meijer ... police use Taser to subdue her"

And yet this became a grim reality last month for one Pontiac, Mich., woman, who I will simply refer to here as "JP" since things are going poorly enough for her as it is. According to the **Macomb Daily**, JB tried to roll out of a Meijer retail store with more than $600 worth of allegedly stolen electronics. The flaw in this supposed master plan turned out to be that her purported getaway vehicle, the motorized cart she was riding in the store, became stuck in the exit door. This left JP unexpectedly stuck in the door with the door alarm blaring. D'oh!!!

The 400-pound JP opted not to flee on foot when the cart became stuck, and, as such, had to contend with the store's loss prevention officers, who asked to see her receipt. Things got progressively worse from there, as JP reportedly shoved and punched one loss prevention officer, cursed out a sheriff's deputy and "took a fighting stance" (still in the cart??), and ultimately ended up getting herself Tasered, arrested and taken off to jail.

Want a 'Raging Bitch' Beer? Not in Michigan

In September 2009, Frederick, Md.-based Flying Dog Brewery learned that its license application to sell its best-selling beer had been rejected by the Michigan Liquor Control Commission. Why? Because its best-selling beer is called "Raging Bitch," and includes a label with

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some other choice words.

The *Washington Business Journal* **reports** that Flying Dog has now decided to fight back, and filed a lawsuit in federal court seeking to overturn the commission's decision and recover damages for its lost sales in Michigan. According to **MLive.com**, the MLCC ruled that the language printed on the bottle was "detrimental to the health, safety, or welfare of the general public." Commissioner Patrick Gagliardi specifically pointed to a proposed label inscription of "Remember, enjoying a Raging Bitch, unleashed, untamed, unbridled -- and in heat -- is pure GONZO."

Flying Dog's lawyer, Alan Gura, stated that the MLCC and its members "have taken it upon themselves to control not merely alcoholic beverages, but speech as well." Flying Dog claims the ban violates its rights under the First Amendment to free expression.

As the Legal Juice blog **observes**, Michigan has previously approved beers named "Doggie Style," "In Heat Wheat," and "Dirty Bastard," so "Raging Bitch" doesn't exactly seem beyond the pale. The banned label is below. Gaze upon it at your own risk.

Moving On From 'Let it Be' to 'Paperback Writer'

At Legal Blog Watch, we turn now from **"Let it Be"** to "**Paperback Writer**." The *Globe and Mail* had an interesting article recently ('**The judge who writes like a paperback novelist**') (via **How Appealing**) about Ontario Court of Appeal Judge David Watt, who has become a bit of a sensation in criminal law circles as the result of a stark transformation in the way he

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writes his decisions.

Until recently, the *G&M* reports, Watt wrote in a traditional, legalistic manner.

But not any more! As the excerpts below show, Watt has gone a different, more breathless direction with his recent decisions. In a recent opinion overturning a domestic murder conviction, Watt wrote:

Early one morning in June, 2006, Melvin Flores closed the book on his relationship with Cindy MacDonald. With a butcher knife embedded in Cindy's back. Fifty-three blunt force injuries.

In another murder case, Watt penned the following:

Handguns and drug deals are frequent companions, but not good friends. Rip-offs happen. Shootings do too. *Caveat emptor*. *Caveat venditor*. People get hurt. People get killed. Sometimes, the buyer. Other times, the seller. That happened here.

Watt's work has brought mixed reviews. David Tanovich, a law professor at the University of Windsor, told the *G&M* that Watt was "out of control" and that he "would not be surprised if there is not a judicial council complaint if he continues." Another law professor named Rakhi Ruparelia said she was stunned by Judge Watt's "disrespect" in the *Flores* decision, and believed he was "trying to titillate and entertain with his writing rather than offer a careful and appropriate consideration of the facts." On the other hand, a Manitoba judge said the *Flores* decision was a "must-read" and "another excellent piece of work by one of Canada's finest criminal law jurists."

For several more examples of Judge Watt's distinctive brand of writing, read the full *Globe & Mail* article **here**.