

APPELLATE BRIEFS

By *Debbie Leonard, McDonald Carano*

SUMMER HIGHLIGHTS FROM THE SUPREME COURT

The Supreme Court had a very productive summer, issuing numerous wide-reaching published decisions. For this month's column, I thought it might be useful to discuss briefly a few cases in particular that touch on areas of interest to many practitioners. What follows is intended only to make readers aware of these decisions, not to provide any in-depth analysis.

Statutory Construction

In the July/August issue of *The Writ*, my law partner Paul Georgeson analyzed the case of *A.J. v. Eighth Jud. District Ct.*, 133 Nev. Adv. Op. 28 (June 1, 2017), in which the Supreme Court strayed from the plain meaning rule of statutory interpretation. There, the Court held that even when a statute is plain and unambiguous on its face, courts may

look to legislative history to interpret the unambiguous language. As Paul noted, that holding left open questions about the future of the plain meaning rule.

A month later, the Court addressed another statutory construction case to decipher whether a district court conducting judicial review of a Public Utilities Commission decision, has discretion under NRS 703.373(6) to grant the petitioner an extension of time to file its opening brief. *Rural Tel. Co. v. PUCN*, 133 Nev. Adv. Op. 53 (Aug. 3, 2017). In setting out the rules for statutory construction, the Court stuck to its long-held plain meaning rule and made no reference to the *A.J.* case: “[W]hen the language of a statute is plain and unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning.” *Id.* at p.

4 (internal quotation omitted). Citing that and other fundamental principles of statutory interpretation, the Court interpreted the word “must” to prohibit the district court from granting an extension of time for filing the opening brief.

As a result, the Court affirmed the draconian result reached by the district court: dismissal of the petition for judicial review because the petitioner requested an extension of time rather than file its brief within the statutory time frame. We can probably anticipate that during the 2019 legislative session, the Legislature will add language to the statute that gives the district court some latitude to grant extensions of time for briefing. In the meantime, if you are representing a party

Continued from page 12

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APPELLATE BRIEFS CONTINUED

in a judicial review proceeding under Chapter 703, make sure to timely file your opening brief. An extension of time, even if granted by the district court, will be fatal to your appeal.

Security Interests/Foreclosure

The fall-out from the 2008 burst in the housing market bubble continued to assert itself into the Supreme Court's decisions this summer. Here are a few quick summaries:

Hefetz v. Beavor, 133 Nev. Adv. Op. 46 (July 6, 2017): held that, to avoid waiver, a party must timely assert the one-action rule found in NRS 40.430 as an affirmative defense in the party's responsive pleadings.

Renfro v. Lakeview Loan Serv., LLC, 133 Nev. Adv. Op. 50 (July 27, 2017): held that the HOA superpriority lien found in NRS 116.3116 is not preempted by the Federal Housing Administration insurance program.

K&P Homes v. Christiana Trust, 133 Nev. Adv. Op. 51 (July 27, 2017): answering a certified question from the United States District Court, the Court held that its SFR Investments decision on superpriority HOA liens is retroactive and applies to all foreclosures conducted since NRS 116.3116's inception.

LN Mgmt. LLC Series 5105 Portraits Place v. Green Tree Loan Servicing, 133 Nev. Adv. Op. 55 (Aug. 3, 2017): held that an HOA foreclosure on a house in Nevada after the homeowners commenced bankruptcy proceedings in Texas violated the automatic stay and invalidated the sale, even though the HOA received no notice of the bankruptcy filing.

Business Entities/Taxation

Gardner v. Henderson Water Park, LLC, 133 Nev. Adv. Op. 54 (Aug. 3, 2017): held that, under NRS 86.371 and NRS 86.381, a member of a limited liability company cannot be personally responsible for the LLC's liabilities solely by virtue of being a member.

So. Cal. Edison v. Dept. of Tax., 133 Nev. Adv. Op. 49 (July 27, 2017): rejected a taxpayer's argument that NRS 372.270 is impermissibly discriminatory under the Dormant Commerce Clause to affirm the district court's denial of a use tax refund. Also concluded that the taxpayer is not owed a credit equal to the transaction

privilege tax (TPT) levied by another state where the TPT is not a sales tax within the meaning of NAC 372.055.

Wynn Resorts v. Eighth Jud. Dist. Ct., 133 Nev. Adv. Op. 52 (July 27, 2017): held that documents otherwise protected by the attorney-client privilege need not be disclosed simply because a corporate board of directors asserts the business judgment rule as a defense. Also joined the majority of jurisdictions to use a "because of" test with a "totality of circumstances" standard to determine whether work over which a party asserts the work product protection was done "in anticipation of litigation."

As these decisions indicate, the Court had a busy summer building its jurisprudence in a number of areas of law. Now, there is a lot of material on the Court's summer reading list to keep practitioners busy for quite some time.

Debbie Leonard is a partner at McDonald Carano LLP, where her practice focuses on appeals before Nevada's appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 Chair of the State Bar's Appellate Litigation Section and is Lead Editor of the Nevada Appellate Practice Manual, 2016 edition. She is also a mediator and Nevada Supreme Court settlement judge.



Federal Court Pro Bono Luncheon
Friday, October 20, 2017
Noon to 1:30 p.m.
1 Hour CLE
Bruce R. Thompson Federal Courthouse

The Judges of the U.S. District Court, District of Nevada and Washoe Legal Services invite members of the bar to a free luncheon to discuss the Federal Court Pro Bono Program. The luncheon will include a general overview of the program, recent success stories, and the need for increased participation from volunteer attorneys in northern Nevada. It will include remarks from the following:

- Chief Judge Gloria M. Navarro
- District Judge Miranda M. Du
- Magistrate Judge Cam Ferenbach
- Magistrate Judge William Cobb

Space is limited. Please RSVP to Heidi Jordan, Judicial Assistant to the Honorable William G. Cobb; email: Heidi_Jordan@nvd.uscourts.gov.



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