

The WRIT

OFFICIAL PUBLICATION OF THE WASHOE COUNTY BAR ASSOCIATION

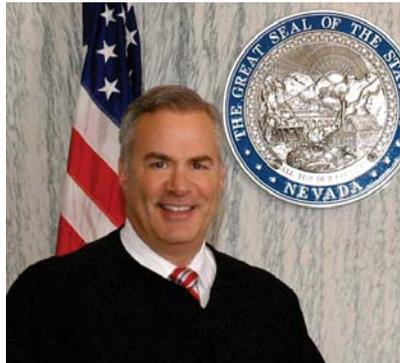
**Wednesday, February 12, 2020, Harrah's Convention Center
12:00 p.m. - 1:00 p.m. - 1 Hour CLE Credit**

State of the Second Judicial District Court with Chief Judge Scott Freeman

Chief Judge Scott Freeman will present his “State of the Court” during the February 12th WCBA luncheon. His presentation will include an update on efforts to obtain a new, safer courthouse, recent happenings in the Court, and 2019 accomplishments.

Prior to his ascension to the bench, Chief Judge Freeman spent 28 years in private practice and has received numerous awards and distinctions. In 2008, he was awarded “Defender of the Year” by the statewide Nevada Attorneys for Criminal Justice. In 2012, he received the Best Lawyers in America award. He has received the 2009, 2010, 2011 and 2012 Mountain States Super Lawyer awards. In 2009, he was named a fellow of the American Board of Criminal Lawyers. From 1999-2012, he has been AV-rated by the international lawyer directory Martindale Hubbell. In 2007, he was Las Vegas Life Magazine Super Lawyer Best Criminal Attorney in Nevada. In 2002, he was Nevada Business Magazine Super Lawyer Best Criminal Attorney in Nevada. In 1999, he was the first recipient of the Washoe County Access to Justice Foundation’s Pro Bono Attorney

Thank you to our lunch sponsor:



of the Year award.

Chief Judge Freeman was also appointed by the State Bar of Nevada to be a permanent member on the Commission for Judicial Selection from 2008-2011. He was the Nevada Law Foundation Chairman of the Board of Trustees from 1998-2000. He was the criminal justice representative on numerous law-related committees, including the Washoe County Public Defender Selection Committee, Washoe County Alternative Public Defender Selection Committee, Nevada Criminal Jury Instructions Committee, Washoe District Court Pattern Criminal Jury Instructions Committee, Washoe District Court Criminal Rules Committee, and the

Nevada Mandatory Sentencing Review Commission. Chief Judge Freeman has also been a lecturer of numerous topics at seminars sponsored by the State Bar of Nevada, Washoe County Bar Association and local universities and high schools. He currently is an instructor in the Criminal Justice Department at the University of Nevada.

Chief Judge Freeman is most proud of his work in the community. He has been a member of the Rotary Club of Reno Sunrise. He was a member of the Board of Trustees for the Children’s Cabinet from 1999 to 2014. He was also active with the International Special Olympics. From 1999 to the present, he has been the Director of Security for the Barracuda Golf Championship, an annual PGA Golf Tour event. As of 2014, he has been an active member of the Reno Rodeo Association.

As Chief Judge, he will promote public trust in an independent, transparent, and efficient judiciary. Chief Judge Freeman is especially focused on ensuring the District Court provides an excellent service in a safe and secure environment.

RSVP by February 10, 2020. \$25 per person for members and \$30 for non-members. Register online at www.wcbar.org or call 786-4494.

RANDOM
THOUGHTS
PG 2

CONVERSATIONS
ON DISCOVERY
PG 3

ACROSS THE
LINE
PG 5

APPELLATE
BRIEFS
PG 8

FAMILY LAW
PG 10

LAW CLERK
CORNER
PG 11

LAW LIBRARY/
PRO BONO
PG 12

COURTS
PG 13

APPELLATE BRIEFS

By Adam Hosmer-Henner, McDonald Carano

Faultless Reversal

In an article reviewing empirical research on judicial decisions, the authors addressed whether “aversion to reversal can produce undesirable, strategic effects on judicial decisions.” Rachlinski, Jeffrey J. and Wistrich, Andrew J., *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 Annual Review of Law and Social Science (2017). Noting the low rates of appellate reversal throughout the federal courts (“approximately 15% of appealed cases are reversed”), the article’s literature review identified studies that “support[ed] the conclusion that avoiding reversal matters to judges.” *Id.* at 10. Such reversal aversion could be caused by “embarrass[ment] by reversal or irritat[ion] by the extra work resulting from a remand.” *Id.* at 10. One recent reversal by the Nevada Supreme Court should not cause the trial judge any embarrassment though, as the Court itself took responsibility for the error leading to reversal. *Reif by & through Reif v. Aries Consultants, Inc.*, 135 Nev. Adv. Op. 51, 449 P.3d 1253 (Oct. 10, 2019).

NRS 11.258(1) and (3) provide that, for actions involving nonresidential construction against design professionals, “the attorney for the complainant shall file an affidavit [with the attached expert report] with the court concurrently with the service of the first pleading in the action.” If the requirements of NRS 11.258 are not met, NRS 11.259(1) mandates that the district court “shall dismiss” the action. *Reif*, 449 P.3d at 1255. In *Reif*, the Court reversed an order of dismissal and clarified that in nonresidential construction malpractice actions, a “pleading is void ab initio under NRS 11.258(1) only where the pleading is served without a concurrent filing of the required attorney affidavit and expert report, not where the pleading is merely filed.” *Id.* at 1255.

While *Reif* was technically a reversal, it was as near to a faultless reversal as possible. In *Reif*, the initial complaint was filed without an attorney affidavit and expert report. *Id.* at 1254. The following day, an amended complaint was filed with the required affidavit and report. *Id.* The amended complaint was then served, together with the supporting documents, while the initial complaint was never served. *Id.* The district court dismissed the complaint finding that the action was filed without the attorney affidavit and expert report. *Id.* at 1255.

The district court, however, had relied directly and precisely on a statement in a prior case *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011): “a pleading filed under NRS 11.258 without the required affidavit and expert report is void ab initio.” (emphasis added). The Court in *Reif* acknowledged that *Otak* had incorrectly used the word “filed” instead of “served” and admitted that this statement was inconsistent with the plain language of the statute. *Reif*, 449 P.3d at 1255 (stating that “in one sentence” in *Otak*, “we incorrectly stated” that NRS 11.258 related to the filing of a pleading rather than the service of the pleading). The Court did not so much as overturn the precedent of *Otak* or reach a different result, it simply recognized that the wrong word was used imprecisely in the prior decision.

In *Otak*, a third-party complaint was filed without an attorney affidavit or expert report. 127 Nev. at 596. That pleading was also served prior to the affidavit or report being attached to the initial or amended pleading. Accordingly, any distinction in NRS 11.258 between a pleading that was served and one that was filed was immaterial for the purposes of the *Otak* decision. In fact, *Otak* repeatedly used the correct language that

was subsequently ratified in *Reif. Otak*, 127 Nev. at 595 (holding that because the “initial pleadings served . . . did not include the attorney affidavit and expert report” they were void ab initio); *Id.* at 598 (holding that automatic dismissal is mandatory “if the pleading is served without the complaining party concurrently filing the required affidavit and report”).

In this relatively strange set of cases, the *Otak* decision reached a consistent and correct result according to *Reif*; the *Reif* decision reached a consistent and correct result according to *Otak*, but the lower court’s decision in *Reif* required reversal because it relied upon an inaccurate statement of dicta in *Otak*. Although the lower court may have extra work to do resulting from remand, this is one situation where the theory of reversal aversion is inapt as the lower court faithfully followed the Nevada Supreme Court’s precedent and the Nevada Supreme Court issued a *mea culpa* rather than a criticism of the lower court ruling.

Adam Hosmer-Henner is a partner at McDonald Carano and practices primarily in the areas of commercial litigation and appellate law. He regularly handles appeals and writ proceedings at the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit.

