The Dalton Wilson Affair, Part I

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"When war is declared, truth is the first casualty."[2] And thus also, it seems, with lawsuits.

After hearing some untrue and malicious claims about Dalton Wilson and his lawsuit, we thought it would be appropriate to explain what is going on. It looks as if it will take several installments. This is Part I. It has taken awhile, so don't expect Part II overnight. Within a few days,[3] we'll begin posting the whole collection at *http://www.tatanka.com/topic/dalton_wilson/index.html*. Each part will be posted as it's done.

First, however, we must correct a falsehood about our relationship to Dalton Wilson's affairs. Neither of us is acting as Dalton Wilson's lawyer. Dalton Wilson had been litigating the issues for years before we ever knew about them. He didn't suggest that we write this. He isn't paying us, and hasn't promised us anything for what we do. That said, we're convinced he's been wronged, and will explain some of the reasons in this story.

Most of Austin depends on government cheques. Not only are the County, State, and Federal governments, the largest employers, there are also an abundance of grants, appropriations, and contracts of all sorts to grease the political skids and to pre-dispose the populace to support the established order. It seems, in this most socialist of towns, that Dalton Wilson has committed two unpardonable offenses: he has defended himself against the government, and he has attempted to inform the craven serfs of their own condition, against their will. For that he has garnered their enmity, although he more rightly deserves their gratitude.

There is more than one case. It seems the most recent action, *Wilson v. Atlas Towing et al*,[4] is the one

[1] A revision history is included after the end of the main text of this document, along with copyright, license, author information, and other details.

[2] Arthur Ponsonby, *Falsehood in Wartime*, 1928

[3] Say, by Columbus Day, 12 October 2011. Not only does it commemorate one of our culture's most esteemed mass murderers (which is fitting, since, as Jesus said, the lawyers killed the prophets), but it is also the anniversary of the pledge of allegiance to the flag (which is fitting, since those who pledge to the "Republic, for which it stands", don't often give a damn about the Constitution and laws which hold that Republic together).

[4] Nevada Sixth Judicial District, CV 10048

getting the most people exercised. Yet hardly anyone seems to know any of the details. It doesn't cost much for copies of the documents, it costs even less to ask. Whatever the price, it would be *far* less than Dalton Wilson has paid for his experience. We haven't yet read all of the pleadings, briefs, exhibits, and other documents in the various cases, but we have read some, and now we've an idea what this is all about. It isn't pretty.

We're not going to go back years to begin from the beginning. We're going to start with the current case, with *Wilson v. Atlas Towing*, and later return to the beginning. This is partly because *Wilson v. Atlas Towing* belongs to current events, and deserves some attention now, and partly because we know it better than the previous cases.

In order to tell this story of how the legal system, and the government in general, can manufacture injustice, we'll have to explain a few things about law and courts and procedure as we go along. So bear with us. However, none of this is rocket science. One of the reasons this tale is so sordid, is that its understanding does not depend on subtle or difficult concepts or principles. Just as you don't need to be a carpenter to see that a nail is hammered in crooked, you don't need to be a lawyer to see that the way this matter has unfolded is also crooked. In other words, the actors cannot plead ignorance or difficulty. Ordinary people, not specialists, can see the dishonesty clearly. You don't need an especially good nose to smell the stink of this corruption from a distance. All you need is to be willing to look honestly at the details.[5] [6]

Courts decide the law by consulting the statutes and rules, and by reference to opinions written by judges in other cases. At least, that's the theory. The statutes, as passed by the legislature, often are terse, ambiguous, and incomplete. The opinions of judges in other cases, especially from courts above, interpret the statutes and the other opinions. For example, the U.S. Supreme Court has expounded on the meaning of "due process" as used in the U.S. Constitution, where the document itself doesn't give much definition. Similarly, the Nevada Supreme Court has decided what various parts of the Nevada Revised Statutes mean, and so on. Legal writing calls these things, and others, *authority*. Some authorities are stronger than others. For example, the U.S. Supreme Court has more authority than a U.S. Court of Appeals. When deciding a case, a judge looks to the highest authority it can find which makes a clear statement about the law in question. Sometimes there is no direct, superior authority.

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[5] Of course, you might want to corroborate all of this, and for that you may want the record. The *record* consists of all that's filed with the court in a case, including transcripts of hearings, and so on. Different courts charge different amounts for copies of documents, but in the Sixth Judicial District Court in and for Lander County, the County Clerk charges a dollar a page. Yup, a dollar a page. (Obviously, Lander County really doesn't want a lot of people getting hold of "public" records.) If there is demand, we can and will put up on the web those portions of the record which we have, saving you your dollars for better (we hope) purposes. Up to a point, we take requests. Drop us an e-mail, naming the artist, album, and track; perhaps you can include a dedication. ("We're posting this affidavit for Quincy, our hamster.")

[6] Note that some words from everyday discourse have special meaning in legal documents. These are known as *terms of art*. For example, *action* is a suit brought in a court of law, despite whatever it might mean in laymen's usage. In an action, a person who brings the suit, or against whom the suit is brought is a *party*. Other persons who have an interest, or who may be affected directly or indirectly by the action, are *not* called parties, they are simply interested persons.

0Sometimes the Nevada Supreme Court will cite opinions from courts in other states, which are not binding on the Nevada court, but which are used as guidance. In the following, the authorities for statements made will be put into footnotes, so as not to distract the reader.[7] [8]

Without going into much detail, this chapter begins after several other cases. One court decided Dalton Wilson owned the land, another court decided he did not. There was an appeal, about which Dalton Wilson wasn't informed (the Bureau of Land Management, the BLM, "lost" the records), to the BLM's own, private court, the Interior Board of Land Appeals (IBLA). Eventually, we reach last summer, when one of the judgments in Federal District Court went against Dalton Wilson.

Usually, there are multiple issues in a case. The court settles the issues, sometimes one at a time, sometimes in groups. Until all of the issues are resolved, however, during the pendancy of a case, the decisions of a court are mutable. A court can rule one way, then change its decision, then change it back again. Once all of the issues have been resolved, then the court renders a "final" decision. The final decision is one which leaves nothing more undecided.[9] [10]

Normally, a case isn't over when a court renders a final judgment. After a final judgment or decision, then there is a period where nothing happens, a pause of sorts, allowing the parties time either to seek clarification or amendment of the judgment, to appeal, or to comply voluntarily with the court's orders. The mere existence of the judgment or order does not force anyone to do anything.

Once the time for appeal, clarification, or amendment has passed, and if the parties have not voluntarily complied with the judgment, then the case enters a new phase, when the prevailing party can seek

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[7] The citations are to statutes, rules, or opinions. If you want to follow up on this essay, and to verify or understand the arguments, and if you don't understand how to interpret the citations, then you ought to pursue the topic, "legal citation", in a good encyclopedia, and take things from there.

[8] You can look up some citations on the world wide web, the internet, but many will not be found there. Unfortunately, even though case opinions are essential to understanding the law, they often are not free. This is one of the big barriers to people understanding law: they cannot simply look up opinions, unless they are in a specialized law library or they have access to a legal research service. Nevada Supreme Court opinions, for example, are not on-line, except for some from the most recent few months, and a few random documents on various web sites, when they relate to a specific issue and someone has decided they need to be put up there. In general, to read the opinions you've got to find a law library or a search service. How are people expected to know the law if they have to pay so much for it, or if knowledge requires access to a specialized library or service?

[9] "[...] any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time". (NRCP 54(b))

[10] The importance of "finality" is explained this way: "FN7. '* * * situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question.' Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70––71 (June 1946)." (*Sears, Roebuck & Co. v. Mackey*, 76 S.Ct. 895, 351 U.S. 427 (1956))

execution of the judgment. Execution may only be done according to law, and there are specific laws about different types of execution. When a party seeks execution of a judgment, he obtains a *writ of execution*. There are procedures for collecting payment for debts, for evictions, for returning property to its rightful owner, for enforcing child custody agreements, and so on. In criminal cases, there are procedures for jailing convicted parties, for protecting victims, and the like. The laws for executions of judgments are as valid and important as the laws which led to the judgments in the first place.

In almost all situations, judgments are executed by the sheriff. If we were to leave judgments to the "winners", clearly there would be problems: there is already likely ill will among the parties, violence and abuse are often probable, and few people know the laws about executions, or how to abide by them. So if a person is owed money in a judgment, he doesn't get to go fetch the money himself; the sheriff does that. If a person is to be evicted from an apartment, then the sheriff does it. If property is to be recovered, then the sheriff seizes it and returns it to its owner. In practice, this all means that the court's writ of execution is made out to the sheriff. It says something like, "In the matter of S v. T, case number 1234: Greetings, Sheriff So-and-so. The XYZ Court of ABC County hereby orders you to execute a judgment in this case according to Statute DEF, as follows...". The writ is *not* made out to the prevailing party. Furthermore, the sheriff cannot execute the judgment, except according to the terms of the writ and as allowed by law. No writ, no execution.[11]

Since the Federal court system was set up, beginning with acts of Congress in the 18th Century, the rule for execution of judgments in Federal courts[12] has always been that judgments must be executed in the same way as they would be done in the State court, for the State in which the execution takes place.[13] For example, if an execution of a judgment takes place in Nevada, Nevada law must be followed. If the execution takes place in California, then California law is followed. This is true even when the United States itself is one of the parties.[14] The mechanisms available in the State determine the mechanisms

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[11] Nevada rules for executions are found primarily in NRS 21, 31, 31A, and 40, but other rules are scattered around elsewhere, depending on the type of relief.

[12] "[...] The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable." F.R.C.P. 69(a)

[13] "In *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, LA., Inc.*, 1993 U.S. Dist. LEXIS 14450 (E.D. La. 1993), plaintiff moved the Court to enter an order directing the sale of the rights and interest of the Partnership in a case where judgment had been entered a year earlier. The District Court looked to Louisiana law as the law of the state in which the action occurred. Applying the appropriate statute, the Court ordered judicial sale of the property by the United States Marshal. Similarly, in *Moseley Assoc v. Brown*, 1988 U.S. Dist. LEXIS 5662 (S.D. NY 1988), the district court looked to state law, then New York Debtor and Creditor Law, to order defendants to satisfy plaintiffs' judgment out of funds which had been transferred to them." (*In Re Marcos*, 910 F. Supp. 1470 (D.Haw. 11/30/1995))

[14] "Section 14 of the Judiciary Act of 1789 conferred upon the courts of the United States power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which might be necessary for the exercise of their jurisdiction agreeably to the principles and usages of law. These words comprehended executions on judgments. *Wayman v. Southhard*, 10 Wheat. 1, 22.
"At the same session an act was passed "To regulate Processes in the Courts of the United States." It provided that:

available to the Federal courts. Of course, there are some necessary differences. Instead of using the sheriff, the Federal courts use the U.S. Marshal. (State court writs of execution are made out to the sheriff; Federal court writs of execution are made out to the U.S. Marshal.) If, for example, a notice needs to be posted, according to State rules, at the County Courthouse, the notice in a Federal case is posted at the Federal Courthouse.[15] The state courts' interpretations of the rules of executions take precedence over the Federal courts' interpretations: the Federal courts must defer to the state courts in deciding the meaning and implementation of these rules.[16] [17]

The law and courts are supposed to take these procedures very seriously, because the statutes describe

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"Until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

"This act was to remain in force only until the expiration of the next session of Congress. It was followed by that of May 8, 1792; and thereafter by other acts, the last of which became R. S. §916. Section 916 prohibits the courts of the United States from adopting, recognizing or giving effect to any form of execution, except such as was, at the time of the passage of the act of 1872, from which it was derived, or has subsequently become by adoption of state statutes, a writ authorized by the laws of the state. *Fink v. O'Neil*, 106 U.S. 272, 278.

"This Court has twice considered the bearing of these statutes upon executions issued on judgments in favor of the United States. In *United States v. Knight*, 14 Pet. 301, it was held that the Act of 1828, supra, gave to debtors in prison under executions from the courts of the United States, at its suit, the privilege of jail limits in the several States as they were fixed by the laws of those States at the date of the act. It was asserted that the statute did not include executions on judgments in favor of the United States, as the sovereign is never bound by any statute unless expressly named. The contention was, however, overruled, and it was held that the obvious intent to create a conformity between the mode of proceeding in federal courts and state courts ought to be given effect.

"In *Fink v. O'Neil*, supra, the question was whether the homestead of a defendant resident in Wisconsin was subject to seizure and sale under an execution issued out of a federal court on a judgment recovered by the United States. It was held that the Wisconsin statute exempting homesteads from such seizure, which admittedly embraced executions issued on judgments held by private citizens, applied also to the United States. It was observed that no distinction is made in any of the successive statutes on the subject between executions on judgments in favor of private parties and those in favor of the United States. The Court added: "And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States." The contention of the Government that on grounds of public policy the sovereign ought not to be subject to exemptions binding on private suitors was overruled.

"It is clear, therefore, that R.S. §916 and rules of court adopted pursuant thereto confine the United States to such executions as may be issued by individuals under the state statutes, and impose upon it the same restrictions and exemptions as are applicable to other suitors, and the question here is whether an exception should be made to this general rule as respects the time fixed by the state statute within which execution must issue. We see no valid reason for making such an exception. [...] We think that in the interest of uniformity, and in the absence of either express state decision or provision by Congress to the contrary, the statute is to be held applicable to all plaintiffs seeking to avail themselves of the writ of execution therein provided, including the United States."
(*Custer v. McCutcheon*, 51 S. Ct. 530, 283 U.S. 514 (U.S. 05/18/1931), footnotes omitted)

[15] "Certain things must be changed. The officer issuing the writ of execution must be the United States clerk, the officer executing it must be the marshal, and not the sheriff, the name of the court must be different, and it is but a reasonable and obvious consequence that the place of the proceedings generally shall be at the federal court house instead of at the

the will of the people, and because there are safeguards built into the procedures in case there have been errors. For example, if property is to be seized, and the property has been identified incorrectly, then the procedures provide a mechanism to correct the court's error. Furthermore, to make the procedure work correctly and safely, proper notice of the execution must be given to the person against whom the judgment was made. Otherwise, without notice, that person would not be able to correct an impending error. The States and the Federal Courts agree: if a judgment is executed incorrectly, then it should be "undone" to the extent possible or practical, then done correctly.[18] This is true *even if the incorrect procedure gave the same result expected from the correct procedure*.[19] For example, if the writ of execution says to sell a cow to get money to pay a judgment, and the procedure is improperly followed,

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state court house." (*Yazoo & Mississippi Valley Railroad Company et al. v. City of Clarksdale*, 42 S. Ct. 27, 257 U.S. 10 (U.S. 11/07/1921))

[16] "The decisions of the state courts construing their own statutes are binding upon the federal court even though it might be said that such state statutes when adopted by the federal courts become pro hac federal statutes." (*Yazoo & Mississippi Valley Railroad Co.*) Therefore, improper execution for a Nevada court is also improper execution for the Reno Federal court.

[17] There is another common situation where Federal courts defer to state courts when interpreting the law. That is when a dispute between citizens of two different states ends up in Federal court under *diversity jurisdiction*. When the dispute involves state law (a contract, for example) as opposed to Federal law (a copyright, for instance), then the Federal court decides *which* state's law applies, and rules accordingly. This process of using state law to resolve disputes in Federal court is known as the *Erie doctrine*, so called after the case *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[18] When there is no writ of execution, or when the writ is improperly served or executed, the remedy is to return the property to the person from whom it was taken.

In *Luciano v. Marshall* (95 Nev. 276, 593 P.2d 751 (Nev. 4/11/1979)), Dierks won a judgment against Luciano. Then Marshall, the sheriff, seized Luciano's property in execution of the judgment. However, the execution was improper. Luciano sought a writ against Marshall, seeking return of his property. Nevada held that, despite the judgment against Luciano, because the seizure was improper, Luciano was entitled to a return of his property, and issued a writ against the sheriff to that effect. In its opinion, the Nevada Supreme Court wrote:

"[...] As regards the seizing of petitioner's property, we reach a different conclusion. The procedure was not authorized by statute, and it constituted a violation of petitioner's constitutional right to be free from unreasonable search and seizure. NRS 21.050 provides that a money judgment "shall be enforced" by execution. Statutory procedures supplementary to execution are spelled out at NRS 21.270-21.340, and nowhere do they authorize such an order. The statutory grounds upon which a search warrant may be issued are set forth in NRS 179.035, and are limited to searches for the fruits, instrumentalities and evidence of criminal activity. Petitioner was clearly entitled to return of his property under the statute, and his motion therefor should have been granted. NRS 179.085(1)(c).

"Even could a statutory basis for the procedure have been found, the search of petitioner's residence, and wholesale seizure of his personal property therein, in aid of civil process, would have been precluded by the constitutional prohibitions against unreasonable searches and seizures found in the United States and Nevada constitutions. *U.S. Const.*, Amend. IV. *Nev. Const.*, Art. 1, S 18. As has been recognized, *Allen v. Trueman*, 110 P.2d 355, 360 (Utah 1941):

'Since the purpose of the interdiction against unreasonable searches and seizures appears to be primarily the protection of the individual against oppressive invasion of his personal rights, it has long been recognized that the use of such warrants should be carefully limited and controlled to attain the objects sought by the constitutional guaranties. Thus Judge Cooley in his "Constitutional Limitations" has said: "Search warrants are a species of process exceedingly arbitrary in character and which ought not to be resorted to except for very urgent and satisfactory reasons." Moreover, it has generally been recognized that the legitimate use of the search warrant is restricted to public prosecutions, and that

then the cow must be returned and the procedure done again, but correctly, even if the result is the same. There is a simple logic to this: if it isn't done that way, then it's too easy to become lax and lazy and to avoid the safeguards. The sheriff must simply do it over until he gets it right. If the safeguards in the procedure are skipped, then sooner or later someone will be damaged by the incorrect procedure, and there may be no way to compensate the injured party.

Under certain circumstances, if the sheriff or marshal violates the rules, the sheriff or marshal might end up owing damages to injured parties. He has some immunity, but it is not unlimited. Government officials have no immunity when they violate a Constitutional right, when that right was clearly established at the time of the violation.[20] As was previously noted, the necessity to follow any law is a no-brainer, when that law has seen the test of time, withstood numerous court challenges since 1792, and been repeatedly tied by the courts to the Constitutional requirement for Due Process. (More on the limited immunity of public officials, below.)

Dalton Wilson's case is a good example of how the system is *not* supposed to work. In the previous Federal case, there was a judgment against Dalton Wilson. However, the BLM never sought a writ of

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in no event may such proceeding be invoked for the protection of any mere private right. . . .'

The Supreme Court of Utah concluded that the plaintiff, who sought return of property seized pursuant to statute, but who was neither arrested nor criminally charged with any crime, was entitled to restitution of his property, since the search and seizure was "unreasonable" under the state constitution. Similar conclusions are reached or reflected in *State v. Derry*, 85 N.E. 765 (Ind. 1908); *Robinson v. Richardson*, 79 Mass. (13 Gray) 454 (1859); *State v. Dillon*, 281 P. 474 (N.M. 1929); and *People v. Kempner*, 101 N.E. 794 (N.Y. 1913).

"It is ordered that a peremptory writ of mandate issue commanding the respondent Sheriff of Clark County to return the property of petitioner. "

(*Luciano v. Marshall*, emphasis added)

[19] When similar cases have been brought before the United States Supreme Court, the U.S. Supreme Court agrees that the remedy is return of the property. The U.S. Court has gone even farther, to declare that it does not matter if the result would have been no different if the writ were to have been served and executed properly.

In a Texas case, Heights Medical Center won a default judgment against Peralta, but the notice of the complaint was not properly served on Peralta. After execution, Peralta sued to vacate the judgment, to expunge all record of the judgment from the county records, and to have his property returned to him. The Texas court decided that Peralta had no defense, and would have lost anyway, denying Peralta the remedy he sought. The Texas Court of Appeals agreed, then the Texas Supreme Court. The case landed in the United States Supreme Court, based on Peralta's claim that his right to due process had been violated. The U.S. Supreme Court sided with Peralta, saying:

"Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). As we observed in *Armstrong v. Manzo*, supra, at 552, only 'wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.' The Due Process Clause demands no less in this case. The judgment below is Reversed." (*Peralta v. Heights Medical Center*, 108 S. Ct. 896, 485 U.S. 80 (U.S. 02/24/1988))

Thus it does not matter if Dalton Wilson would have lost his property anyway: he must be restored to his former position and the procedure done properly.

Of course, since Dalton Wilson's property has been destroyed, he is entitled money damages.

[20] See, for example, *Pearson v. Callahan*, 129 S.Ct. 808, 172 L.Ed.2d 565 (U.S. 01/21/2009)

execution from the Federal court. The U.S. Marshal never became involved. Some BLM employees decided to execute the judgment themselves. In so doing, they were acting in violation of the law of Nevada, because they had no authority to do what they did. This was not a mistake: the law about executing judgments has been the same since 1792: Federal procedure follows State law. The BLM has lots of attorneys to explain this to them. Moreover, the procedures in Nevada haven't changed much since Statehood: the sheriff executes the judgments. Finally, the people, including Atlas Towing employees or contractors, who went on to Dalton Wilson's property didn't follow the procedures anyway, so even if the Marshal had done it the way the defendants did it, Dalton Wilson would be entitled to have the seizures reversed, and done over again correctly. If the sheriff or marshal can't get away with it, then neither the BLM nor any of its rogue employees can't, either. In fact, if the U.S. Marshal or the sheriff does not follow the law when executing a judgment, he can under some circumstances be sued or charged with a crime.

To illustrate this principle, here's an example: Suppose you got a judgment against your local donut shop because you paid for some crullers which were never delivered. If the donut shop doesn't pay, the court can order the sheriff to give the shop proper notice, to go into the shop, to take the money out of the cash register, and to give it to you. However, if you go into the donut shop yourself, and take the money out of the till yourself, you're guilty of robbery, and – besides owing the money back to the shop – you can go to jail for the crime. Just because you won in court, you're not entitled to play sheriff or deputy or marshal. If the sheriff were to come onto the WalMart parking lot, and simply destroy a pickup truck, you don't have to be a lawyer to know that *some* law was being broken, even if you couldn't put your finger on which one.

Simple and sensible, right? Not according to Sheriff Ron Unger, who when informed of the impending crime, refused to prevent it. You can decide whether it was cowardice, corruption, laziness, or stupidity. All Unger needed to do was to send a deputy to check if there was a writ of execution, and, if so, if the U.S. Marshal was acting under authority of law. No one asked Unger to interfere with any lawful procedure, or to interfere with the U.S. Marshal.

Dalton Wilson took his problem to the courts, where he sought a *writ of mandamus*, also called a *writ of mandate*, ordering Unger to do his job. A petition for such a writ is the way established by law to force a public official to do a duty that official already has. Judge Michael Montero never issued the writ.

When a person has suffered damages, and seeks relief, he can file a *tort*[21] action in civil court.[22] The

[21] A *tort* is a civil wrong based on law, for which a court may provide a remedy in the form of damages. Torts do not include breaches of contract. A tort is a an act which wrongly causes damages to the other person. Reckless driving leading to an auto accident, selling a defective product, committing a trespass, an assault, or many other acts causing injury, may constitute torts. A single act may, sometimes, give rise to a tort claim and to a contract claim, as well. The same act may also be a crime at the same time.

[22] There are sometimes different kinds of courts, for different purposes. This is historical, going back to England, where

person committing a tort is called a *tortfeasor*. If several people together commit the tort, they are joint tortfeasors. One principle of tort law is that an employee or other agent isn't off the hook, merely because he was hired or contracted to commit the tort. If A hires B to torch a building, and B sets the building ablaze, then both together and separately are guilty of the crime of arson, and both have also committed a tort against the building's owner and tenant.. It is not an excuse that your boss told you to do it. It works the other way, too: an employee committing a tort may make the employer liable, under certain circumstances.

After the damage was done, Dalton Wilson filed a tort action against Atlas Towing, which had been given a contract by the BLM to do some of the work. Another principle of tort law is, if you make a tort claim, you can chose which of multiple tortfeasors to sue: you don't have to sue them all. (You don't have to sue anyone, if you don't want.)[23] Dalton Wilson chose not to sue everyone involved.

However, Dalton Wilson reserved the right to sue some of the actors whose names he did not yet know. He expected to learn some of those names later, when he conducted *discovery* as part of the action. (We'll explain discovery below; it happens during the action after the jurisdictional phase, but before the trial itself.) He did this by suing various Does, as in John Doe, Jane Doe, and so on. Dalton Wilson wasn't sure of the names of the specific people who destroyed his property, so he called them "Does 1-20" on the complaint, and expected to substitute the actual names later, after he learned who, specifically, was responsible. Not all jurisdictions allow suing Does, but Nevada permits it in the

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there were chancery courts, law courts, ecclesiastical courts, and others. The United States inherited the system, though it was somewhat less complex here. Each kind of court had its own rules, and its own purposes. Sometimes there were conflicts in England, with one court jailing someone for enforcing another court's ruling, and the second court releasing the jailed person. A simplification movement began, and, especially in the 19th Century, various jurisdictions began to use common rules. Nevertheless, in some States, a single courtroom and judge may sometimes, for example, act as a law court, and at other times as a chancery court, depending on the case.

[23] An assertion by Atlas Towing that they were engaged to perform the actions by BLM, or an assertion by any employee or agent of Atlas Towing that he or she was instructed by Atlas Towing to perform the improper actions, does not mandate joinder of any specific actor.

A plaintiff in a tort action involving principal and agent is free to sue either the agent, or the principal, or both; not all tortfeasors need to be joined to the action; equivalent principle applies to actions against principal and surety "a plaintiff is free to sue the agent, the principal, or both" under common law (*Abshure v. Methodist Healthcare-Memphis Hospitals*, No. W2008-01486-SC-R11-CV (Tenn. 10/20/2010), citing *Miller v. Staples*, 32 P. 81, 81 (Colo. App. 1893); *Cascarella v. Nat'l Grocer Co.*, 114 N.W. 857, 858 (Mich.1908); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 2009 OH 3601, ¶¶ 21-22, 913 N.E.2d 939, 944; *Parlin & Orendorff Co. v. Miller*, 60 S.W. 881, 882 (Tex. Civ. App. 1901); Frank B. Cross & Roger LeRoy Miller, *The Legal Environment of Business: Text and Cases* -- Ethical, Regulatory, Global, and E-Commerce Issues 497 (2008))

"It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." (*Azamar v. Stern*, 662 F.Supp.2d 166 (D.D.C. 10/14/2009), citing *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990))

" 'It is no answer or defense that the plaintiff has not chosen to pursue the principle first, if he is following a remedy given him by the bond.' *FinanceAmerica Corp. v. Kruse Classic Auction Co., Inc.*, 428 F. Supp. 135 (E.D.Penn. 1977)" (*Central States, Southeast & Southwest Area Pension Fund v. Safeco Insurance of America*, 717 F. Supp. 572 (N.D.Ill. 06/26/1989))

Nevada rules. Federal courts do not permit suing parties whose names are not known.

There is another way to sue when the plaintiff doesn't know the names: once the plaintiff learns the names, then he can join them to the action. In fact, a defendant can also join parties to an action, if their joinder is needed for "just adjudication".[24] The main reason to sue unknown Does is when you are running out of time with respect to a statute of limitations: by suing the Doe, you can get the action filed in the time allowed, then find out who it was later and give the Doe a proper name.

Joinder of parties can be optional, or mandatory, or sometimes mandatory depending on conditions. There are several basic reasons a party might need to be joined.

> You might want relief from a specific party. Maybe you just want to make him pay, maybe he has lots of money to pay, or some other good reason. Maybe he is the only one who can set things right. If he is liable, he can be joined.
>
> A party might need to be joined to protect some legal right is has. For example, if two people jointly own some asset, and one is sued, the other might need to be joined to protect and to defend that asset, even when the plaintiff doesn't want to sue that other owner. The court is expected to add parties when necessary, to protect them, without being asked by any party.
>
> When two actions are related by being dependent on a common set of facts and circumstances, then they should be tried together. For example, two different injuries deriving from the same accident might need to be tried together, so that the common issues can be decided once and together. There are two justifications for this: judicial economy (saving the court's time, so it doesn't have to do things twice), and avoiding inconsistent rulings where one trial would decide a fact one way and another trial would decide things another way.
>
> A party should be joined to avoid the danger of multiple obligations and multiple recoveries. For instance, if money is owed by two people, and a plaintiff sues them separately, he might be able to collect twice, once from each debtor. To prevent his, both debtors should be joined.

Usually, when a party wants to join someone to the action, he requests permission from the court. The policy is that of permissive joinder: if a party gives some good reason, the court must allow the joinder absent some better reason to the contrary. Still, joinder is often optional, as in the case of joint tortfeasors.

Sometimes, joinder must be done unless the court would be deprived of jurisdiction. In other words, if joining a party would force the issue into a different court, then the court need not join the party unless

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[24] Sometimes, a party may even be added as an "involuntary plaintiff". In other words, that party might be forced to sue someone else, even if they never intended to do so.

that person is *indispensable*. If a party is indispensable, and the court would be deprived of jurisdiction, then the action was brought in the wrong court, and the case must be dismissed or, sometimes, removed to the correct court. In order to be indispensable, the party must have some legally cognizable right to protect, the protection of which requires his joinder. This is interpreted fairly strictly: there must be a specific right to protect, not merely an interest in the outcome of the case. For example, insurance companies might have an interest in the outcome of an automobile accident case, because they might end up paying the judgment, but they are not considered indispensable parties; otherwise, there would be insurance companies joined to every auto accident case.[25] A potential *obligation* of the insurance company is not a legal right.

That the actions were illegal does not, by itself, require joinder.[26]

Also, it is not necessary to join a party to obtain evidence from him. The court can subpoena non-parties, or they can testify voluntarily at the request of one of the parties. Simply because you need testimony from XYZ, you don't need to join him. He can be a witness, or provide documents or other evidence, without being a party.

This matter of indispensable parties is essential to what follows, but we must first explain some other things and move a little further along in the narrative. We brought up joinder of parties because it relates to suing Does, as an alternative mechanism, but it will come up again later. Meanwhile, back to the story...

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[25] The possibility that all of the liability, through obligations to indemnify Atlas or other persons, might eventually devolve on BLM does not require their joinder.

"Potential indemnitors have never been considered indispensable parties, or even parties whose joinder is required if feasible. *Pasco Intern. (London), Ltd. v. Stenograph Corp.*, 637 F.2d 496 (7th Cir. 1980)." (*Central States, Southeast & Southwest Area Pension Fund v. Safeco Insurance of America*, 717 F. Supp. 572 (N.D.Ill. 06/26/1989))

[26] Allegation of illegal or improper actions does not justify joinder.

"Other courts similarly have found that a mere claim that a non-party has acted illegally is insufficient to create an 'interest' in the non-party...." (*Azamar v. Stern*, 662 F.Supp.2d 166 (D.D.C. 10/14/2009), citing *Hite v. Leeds Weld Equity Partners, IV, LP*, 429 F. Supp. 2d 110, 116 (D.D.C. 2006))

"The mere fact, however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party. Given the vast range of potential insults and allegations of impropriety that may be directed at non-parties in civil litigation, a contrary view would greatly expand the universe of Rule 19(a) necessary parties. It is therefore not surprising that cases interpreting Rule 19 consistently hold that such 'slandered outsiders' need not be joined." (*Pujol v. Shearson American Express Inc.*, 877 F.2d 132 (1st Cir. 06/05/1989))

When a civil action[27] is filed, the plaintiff serves a *complaint*[28] on the defendant.[29] Dalton Wilson had the complaint served on Atlas Towing.

It is important to note that, for the most part, Dalton Wilson's claims don't depend on who owns the land. Dalton Wilson alleges that his property was destroyed, that the defendants engaged in various improper activities, and so on. However, who owns the land is not essential to most if not all of the charges. The law backs this up, but to see this intuitively, suppose someone destroyed your vehicles and equipment, took your possessions, and seized your animals. Does it matter if the pickup truck that was destroyed was parked at your house, at his house, or in the WalMart parking lot? No, of course not: no one has a right to destroy your property, wherever it might be. If you leave the pickup truck at WalMart, and the WalMart people grow weary of looking at it, they don't have a right to crush it, to demolish it, or otherwise to damage it.

In various documents, defendants refer to the fact that some property was to be considered "abandoned".[30] However, that does not give anyone the right to destroy it. Under Nevada law, you must turn over to the State any abandoned property which comes into your possession.[31] There are special rules for property left behind by a renter, for vehicles, and so on, but you don't get to acquire, to have, or destroy anyone's property merely because it was abandoned. Regardless of the procedure, the owner is

[27] A civil action, or lawsuit, is any action which is not a criminal action. Each action is given a docket or case number, so a specific action can be identified by the docket or case number and the court in which the action took place. When there is an appeal, the appellate court dockets the case anew, with a different case number, so a single litigation can span multiple case numbers and courts.

[28] The plaintiff serves a *complaint*, which alleges what the defendant did wrong and what sort of relief the plaintiff wants. The defendant serves his *answer*, which should answer each point in the complaint, and show defendant's defenses to the allegations in the complaint. If the defendant has a beef with the plaintiff, he might file a *counterclaim* or *cross-claim*, in which case the plaintiff is expected to file an answer to the cross-claim or a reply to the counterclaim. When there are more than two parties, the pleading names can become quite baroque, so you might see a document entitled "Answer to Third-Party Cross-claim by Plaintiff and Third-Party Cross-claim Defendant." Mercifully, these are usually given simpler names, ignoring the strict formalities. Also, different jurisdictions have different names for these pleadings.

[29] In Nevada, actions are meant to follow the *Nevada Rules of Civil Procedure* (NRCP). Federal actions follow the *Federal Rules of Civil Procedure* (FRCP). NRCP are very close to FRCP in most areas; even the rule numbers are the same. (For example, NRCP 54, "rule 54", is almost identical to FRCP 54.) Other states are mostly, but not completely, similar, except the rules in various states are named, and might be numbered, differently. In some states, the rules are found in the statute books. In Nevada, the rules aren't in the Nevada Revised Statutes (NRS), but are written by the Nevada Supreme Court.

[30] Under law, abandonment is a voluntary act. It is not legally possible to declare that something will be abandoned in the future, since that pre-supposes that certain things will be done voluntarily, in advance. The court does not have a time machine. Suppose, for example, that Dalton Wilson had become injured and was unable to move the property; then the property would not be abandoned, because Dalton Wilson might have left it there involuntarily. The condition of abandonment must be determined *after* the fact, not in advance. The Federal court order was flawed, as was the rest of the proceeding, but that discussion will be left for a subsequent part of this story. Stay tuned...

[31] Most kinds of abandoned property are coverd by NRS 120A. Other specialized kinds of abandoned property (vehicles, property left behind at a rental, and so on) are covered by other chapters. This must come as a great shock to all of you Austinites who "collect" abandoned property, waiting until after dark to chance upon it and consider it abandoned, thus acquiring it by five-finger discount.

notified, by the State or by the landlord, and is given some period of time to retrieve it. Even in the case of property abandoned to landlords, after the waiting period, an auction must be conducted, and the proceeds less any back rent must be kept for the property's owner. Accordingly, it doesn't matter if the property was abandoned: it remained Dalton Wilson's property.

Omitting some details, Atlas Towing didn't answer the complaint. On 14 December 2010, Nick Ayers of Atlas Towing wrote a letter to the court, explaining that Atlas was working at the behest of the BLM, and that the BLM would take care of the matter. The court clerk stamped this letter, "Answer", and filed it. However, in Nevada district courts, when a party makes an initial appearance before the court, unless that party is represented by an attorney, the pleading must be notarized.[32] Since the letter wasn't notarized, it was as if it weren't filed at all. This rule is reasonable, it can serve to prevent a lot of mistakes and fraud. (What if the wrong person answers?) It isn't as strict as it sounds: once the error is pointed out, the courts usually allow the pleading to be corrected, so genuine errors can be accommodated. Dalton Wilson filed a motion to strike the letter as unverified,[33] but the motion was ignored.

Dalton Wilson therefore (since Atlas Towing had not answered) obtained entry of a default against Atlas Towing: by not appearing, they lost, although the amount of damages was still to be determined. "Entry of default" (failing to answer) is to be distinguished from a "default judgment" (awarding relief in the form of damages or other awards).

At this point, Hy Forgeron, former county attorney, made his appearance as attorney for Atlas Towing. He asked the court to lift the default, and to move ahead with the case. The court granted the request, lifting the default, and gave Atlas Towing twenty days to answer the Complaint. (Twenty days is the normal time to answer a complaint in Nevada courts; the State and its subdivisions have forty five days.) However, Atlas Towing never answered the Complaint. This is funny, in a twisted way. Hy Forgeron prepared and submitted the order lifting the default, in advance of the hearing where the decision was to be made; Michael Montero signed the order; then Hy Forgeron ignored his own order.[34] Don't count on Mr Forgeron citing himself for contempt or anything like that: he and Montero only seem to joke at someone else's expense.

Instead, Atlas Towing asked the court to dismiss the case for failure to join an indispensable party, when that joinder allegedly would have deprived the Sixth Judicial District Court of jurisdiction. Atlas Towing claimed that the BLM was an indispensable party, and that the Federal Tort Claims Act, which requires that claims against the Federal government be heard in Federal court, deprived the Sixth

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[32] "Unless appearing by an attorney regularly admitted to practice law in Nevada and in good standing, no entry of appearance or initial pleading purporting to be signed by any party to an action shall be recognized or given any force or effect by any district court unless the same shall be acknowledged by the party signing the same before a notary public or some other officer having a seal and authorized by law to administer oaths." (DCR 20)

[33] *Verification* is the attachment of a sworn statement to a document, attesting to its validity.

[34] You can't make this stuff up.

Judicial District Court of jurisdiction to hear Dalton Wilson's claims. Atlas Towing asserted that the BLM has a right to enforce its Federal court judgment against Dalton Wilson, and Dalton Wilson's case would jeopardize their right to enforce that judgment, so BLM must be joined to enable BLM to protect its right.

There are some big problems with Atlas Towing's argument.

> First, the actions which were the subject of Dalton Wilson's Complaint were not legal: neither the BLM nor anyone else had the right to do what was done. If there had been a writ of execution from the Federal court, and if the U.S. Marshal had executed the writ, and if the execution had been done according to Nevada law, then Dalton Wilson wouldn't have a cause of action. However, there was no writ of execution, the U.S. Marshal was not involved, and the actions were not done according to law. What was done to Dalton Wilson's property, and to Dalton Wilson, were in violation of law, and not in lawful pursuit of execution of the Federal court judgment. How can anyone have a *right* to conduct illegal activity?
>
> Second, Dalton Wilson was asking the court for damages for illegal activity conducted in the past. He was asking to be compensated, not to prevent any activity in the future. BLM had not pursued their right to enforce the judgment, because they had not sought a writ of execution, which would have ordered the U.S. Marshal to execute the judgment. Nothing which Dalton Wilson sought would in any way interfere with the BLM's right to seek a writ in the future. How was Dalton Wilson's petition for damages a hindrance against BLM in the future?
>
> Third, it's not clear that the BLM was responsible for the actions. That requires a little explaining. Suppose you were a rancher who hired a cowboy to watch your herds. While out on the range, the cowboy decides to assault a backpacker and rob the backpacker. Furthermore, the cowboy tells the backpacker he's working for you, and is authorized to force the backpacker off your (the rancher's) lands. Are you liable? Can you be sued or charged with a crime? Of course not, because you hired the cowboy to herd cattle, not to assault backpackers or work security. So the relevant question here is, did the BLM hire its employees to break the law, or did they do it without BLM blessing?

For that last point, the legal principle is, approximately, that you have vicarious liability for your agents (including employees) when they are acting according to your instructions. However, when they are acting on their own, you are not liable. The technical terminology is, when employees are acting on their own, they are engaged in a *frolic*. (And you thought legal language wasn't humorous.) If you send your employees out on an errand, and they stop off for a little shopping, or to take in the sights at a strip club, then they are on a frolic. If the accident happens while they are performing their duties, then you may end up paying for it.

You can bet your sweet bippy that there isn't much in the BLM regulations which require BLM

employees to break the law in furtherance of their duties. In fact, the BLM has almost certainly covered its own butt by requiring its employees to act according to the law. Those BLM rules and regulations were vetted by an army of government attorneys.[35] [36]

The United States claims *sovereign immunity*. Among other things, this means that no one has a right to sue the United States for its actions or omissions.[37] However, the United States has waived, to some extent, it sovereign immunity to allow actions against it under certain circumstances.[38] The Congressional act which conditionally waives U.S. sovereign immunity is commonly called the Federal Tort Claims Act, or FTCA.[39] The FTCA has seen amendments, most notably the Westfall Act.[40] A tort claim against the U.S. necessarily involves some misdeed by an employee or agent of the U.S., since the U.S. is intangible and only acts through its agents.[41] For example, if a Federal employee causes an automobile accident, then the Federal government itself is usually liable for damages. The FTCA allows substitution of the U.S. for the federal employee under certain circumstances, thus making the U.S. the defendant, rather than the employee. However, there are various exceptions, commonly called "defenses" because they are defenses by the U.S. when the U.S. avers that it is not liable, by reason of its sovereign immunity and the restrictions in the FTCA. To further complicate the picture, there is a

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[35] If you ask an employee to break the law, then you've got a problem yourself. If you discipline or dismiss an employee for failure to break the law, then that employee has a cause of action against you. If push comes to shove, you can count on the BLM leaving its employees and agents to take the heat. The upper level bureaucrats aren't going to the mat for the lower level bureaucrats. So as far as anyone will every be able to determine, those who did this did not act with BLM authorization. That does not mean, of course, that anyone will ever be punished by the BLM for those actions; the upper level bureaucrats will, in that context, look the other way.

[36] It gets a little more complicated than this when an organization has powers which are limited by its charter, or an officer has limited authority according to its rules. Then, when the officer does something which he does not have the power to do, he is said to be acting *ultra vires*, which is "beyond his powers". In such cases, he becomes personally liable for whatever *ultra vires* action he takes. This applies to officers in government bodies, too, but the rules are different and we have not investigated too far along these lines.

[37] If this sounds uppity, it descends from the principle that "the King can do no wrong". The U.S. puts itself into the same place as the King. The states of the United States do the same thing, considering themselves sovereign.

At first, shortly after the U.S. Revolution (1775-1783), the states considered themselves sovereign. After the Constitution of the United States (ratified by eleven states in 1788, government beginning in March 1789, with North Carolina and Rhode Island ratifying by the end of 1790) the individual states were deemed to have granted some of their sovereignty to the United States. Thus, the U.S. and the states have shared sovereignty.

Theoretically, the states obtain their own sovereignty from the people.

[38] States may waive their own sovereign immunity to various extents. Nevada's conditional waiver is found in NRS 41.031 *et sequentia*.

[39] June 25, 1948, ch. 646, Title IV, 62 Stat. 982; 28 U.S.C. Pt.VI Ch.171; 28 U.S.C. §§1346(b), 2671-2680

[40] In *Westfall v. Erwin*, 484 U.S. 292 (1988), the U.S. Supreme Court interpreted the FTCA too broadly for Congress's tastes, by limiting the absolute immunity of Federal officials. The Westfall Act reinforced the immunity. It is codified as §2679. Sometimes §2679 is referred to as part of the FTCA, sometimes it is called the Westfall Act.

The Westfall Act is also cited as The Federal Employees Liability Reform and Tort Compensation Act of 1988, P.L. 100-694.

[41] A government (or corporation or other artificial person, for that matter) can only act through its officers, employees, or other agents. It always comes down to a real, live person. The question is, "Was the actor working on his own behalf, or in the course of his duties with the government (or corporation, etc)?"

separate question of the immunity of government officials and employees. In other words, there are two questions to be answered when applying the FTCA: Will the U.S. accept liability? Is the actor (employee or official) immune?

Regarding U.S. liability: In summary, the U.S. will not accept liability in the following types of claims: suits by military personnel for injuries sustained incident to service; suits by Federal civilian employees covered by the Federal Employees' Compensation Act, for work-related injuries; claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function."[42]; claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[43], as long as the tort is not committed by an "investigative or law enforcement officer of the United States Government."[44]; for claims in accordance with state law imposing strict liability[45]; for interest prior to judgment or for punitive damages; for the act or omission of an employee exercising due care in the execution of an invalid statute or regulation; for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"; for claims arising in respect of the assessment or collection of any tax or customs duty; for claims caused by the fiscal operations of the Treasury or by the regulation of the monetary system; for claims arising out of combatant activities; or for claims arising in a foreign country.

Regarding employee or official liability: Federal employees and officers are immune under state tort laws for torts committed within the scope of their employment.[46] However, they may still be held liable for violating the Constitution or for violating a federal statute that authorizes suit against an individual.[47]

These two liability questions (U.S. and employee) hinge on an important determination: was the action within the scope of the law, the Constitution, and the scope of employment of the actor? What it comes down to is, if the employee was acting within the law, within the Constitution, and within the scope of his employment, he is immune, and if none of the exceptions apply, the U.S. takes the heat. If the exceptions apply, then the plaintiff is out of luck.

As explained above, the rules for Federal employees are carefully crafted so that employees are never expected to break the law.[48] Therefore, the scope of employment is circumscribed by the law and the

[42] This is known as the *discretionary function exception*. See 28 U.S.C. §2680(a). It precludes liability even if a federal employee acted negligently in the performance or non-performance of his discretionary duty.

The question of what is discretionary (as opposed to ministerial) is complex, and will be dealt with later when the liability of Lander County and Sheriff Unger is considered.

[43] This is known as the *intentional tort exception*. See 28 U.S.C. §2680(h),

[44] Think of the law enforcement clause as an exception to an exception.

[45] *Strict liability* is the doctrine that manufacturers are liable for injuries sustained as a result of defects in their products.

[46] 28 U.S.C. §2679(b)(1)

[47] 28 U.S.C. §2679(b)(2)

[48] Of course, the laws are broken all of the time, enforcement is lacking, and the government is out of control. However,

Constitution. As was shown earlier, the Constitution and law were both violated in Dalton Wilson's case, so any BLM employees were *not* acting within the scope of their employment. Accordingly, they may be sued in Nevada courts and the U.S. has no liability.

The FTCA (as amended by the Westfall Act) establishes procedures for determining the answers to these questions. In order for the U.S. to be considered a party, a determination ("certification") must be made that the employee was acting within the scope of his employment. 28 U.S.C. §2679 defines the process. The mechanism described in this section is the *only* way that a tort claim may be made against the U.S. or one of its agencies under the FTCA.[49] In relevant part:

> There must be a certification that the employee was acting within the scope of his employment. This is based on the principle that employees on a frolic, or rogue employees, do not incur vicarious liability to an employer. The statute lists several ways this might occur. The employee might take a claim against him to his boss, and say, "Hey, I did this as part of my job. You need to cover my ass." Then the U.S. Attorney General makes a determination.[50] If the Attorney General doesn't act, or decides not to cover the employee, then the employee can go to the court (in which he was sued) and seek relief. Or, the court can make the determination in the first instance, without involving the Attorney General. Federal courts have power of review over the Attorney General's decision, if any.[51]
>
> (The reason for removal to Federal court is that, under the FTCA, the Federal courts have exclusive jurisdiction over tort claims against the U.S.)
>
> Such determinations may be made in state courts. "[...] If the court that made this certification was a state court, then the Attorney General may remove the case to a federal district court, but if the federal district court finds that the employee's actions were not within the scope of employment, then the case must be remanded to state court."[52]

In other words, when in state court and the Attorney General has not made a determination, the FTCA[53] *requires* that the state court make the determination. If the state court decides that the U.S. ought to be a party, then the case is to be removed[54] to Federal courts. If the Federal court decides otherwise, it is

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that one of the very reasons this affair has gone bad, and the courts, if they operate properly, can provide a remedy. The courts ought to be one of the last lines of defense against government employee misconduct. We shall see.

[49] "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive." (28 U.S.C. §2679(a))

[50] Of course, he's a busy guy, and somebody working for him might do this.

[51] *Osborn v. Haley*, 127 S.Ct. 881, 549 U.S. 225, 166 L.Ed.2d 819 (U.S. 01/22/2007)

[52] Congressional Research Service: *Federal Tort Claims Act*, CRS Report for Congress, 95-717, 11 December 2007, page 23 (page "CRS-20")

[53] Specifically, §2679(d)(3). There are some other procedural niceties, such as notification, but that's the basic idea.

[54] Removal, or transfer, to Federal court is a common and ordinary procedure used in state courts. It is usually done when

remanded[55] back to the state court.

Hy Forgeron, as Atlas Towing's attorney, has asked the Nevada Sixth Judicial District Court to dismiss Dalton Wilson's case because the Nevada court has no jurisdiction over the United States, and the United States is required as a party. Thus, there is a further flaw in Forgeron's motion: even if the Nevada court were to determine that the BLM were an indispensable party (and it appears that is not true anyway), the correct procedure is not to dismiss the case, but rather to remove it to Federal court. But first, the Nevada court must decide whether the BLM employees were acting within the scope of their employment, which must also be within the scope of the law and the Constitution.[56] That will require much more than affidavits: it will require discovery and other procedures. There is clearly insufficient evidence in front of the Nevada court for such a determination to be made at this point. In other words, dismissal of the case would be a violation of due process. (Again.)

Atlas Towing made a further argument that, in order for Dalton Wilson to win, the Sixth Judicial District Court of Nevada would have to find that the land belonged to Dalton Wilson. This is tantamount to claiming that, in a case where a tenant was improperly evicted from an apartment, the court would have to find that the tenant owned the apartment building. If a landlord destroys a tenant's property, the tenant is wronged, whether or not the tenant owns the building, or the landlord owns the building, or the landlord leases the building from someone else and rents out the apartments.

So, for emphasis, we'll ask those three questions again: What cognizable, legal right of the BLM was threatened? How can damages for an illegal act in the past affect the tortfeasor's and criminal's rights in the future? Was the BLM (as opposed to rogue BLM employees) actually responsible for the actions?

Finally, if the BLM had some interest in the matter, they might have intervened themselves. An interested party can intervene, or join themselves. to an action. According to the sworn testimony of Atlas Towing's employees, the BLM knew about the action. However, the BLM took no steps to join the lawsuit in any way. This indicates that the BLM didn't seem to feel it had any interest to protect in the matter.[57]

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the defendant asserts that the state court does not have jurisdiction.

[55] Remand is the process of "sending back". The term refers to a Federal court sending a removed case back to a state court. It also designates a case being sent back from an appellate court to a lower court after an appeal.

[56] It is not necessary to break the law or violate the Constitution to incur liability. In other words, merely because the rules are being followed does not mean that the United States or one of its employees are not liable. Consider auto accidents, where there may be no traffic laws broken, but *someone* will be held responsible for the collision. Accidents happen.

[57] The BLM has been notified of this litigation. By not intervening, they have forfeited any right they might have had to be considered, for their own reasons, indispensable parties.

> A party, with notice of an action, who takes no action, may lose status as a necessary party.
>
> "Cobra was on notice from before trial that it would have no representation at trial and can be deemed to have waived any status as a necessary party by its inaction." (*Golembieski v. O''Rielly R. V. Center Inc.*, 708 P.2d 1325, 147 Ariz. 134 (Ariz.App.Div.2 07/11/1985))

As the moving party, Atlas Towing had the burden of proof in the motion to dismiss for failure to join an indispensable party.[58] They were required[59] to specify the specific interest[60] of the BLM which necessitated joinder, but they did not.[61]

But we must go back again to the story, after another short lesson on legal procedure.

The term *due process* is much misunderstood and much misused. Everyone, according the to 14th Amendment, is entitled to due process. Earlier, it was mentioned that the U.S. Supreme Court has

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"Courts have routinely recognized that the ability of a nonjoined party to intervene in an action to avoid prejudice is a compelling factor in determining whether to dismiss a case for failure to join a necessary party (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d at 820-821; *Matter of 27th St. Block Assn. v Dormitory Auth.*, 302 AD2d at 163; *Dainippon Screen Mfg. Co. v CFMT, Inc.*, 142 F3d at 1272). Mykotronx clearly would have been permitted to intervene [...] However, Mykotronx and its corporate parent elected not to have Mykotronx intervene and instead filed their preemptive action in Maryland. This deliberate choice of litigation strategy further mitigates any prejudice [...]" (*L-3 Communications Corp. v. SafeNet, Inc.*, No. 655 (N.Y.App.Div. 08/30/2007))

"The City contends that the HRD is a necessary party under Fed.R.Civ.P. 19(a)(1) and 19(a)(2)(ii). […] Compulsory joinder is not appropriate under this subsection either. First, the HRD has not sought to intervene in the action and thus has not 'claim[ed] an interest' in the action. '[I]ts decision to forgo intervention indicates that the [HRD] does not deem its own interests substantially threatened by the litigation,' a determination that 'the court should not second-guess . . ., at least absent special circumstances.' *San Juan Bay Marina*, 239 F.3d at 407." (*Travers v. City of Newton*, 04-12635-RWZ. (D.Mass. 11/09/2005))

[58] " 'In determining whether a party is 'necessary' under Rule 19(a), the court must consider whether 'complete relief' can be accorded among the existing parties, and whether the absent party has a 'legally protected interest' in the subject of the suit.' [*Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992)] (quoting Rule 19(a)). The inquiry is fact specific, and the moving party 'has the burden of persuasion in arguing for dismissal'. Id." (*Brewer v. Indymac Bank*, 609 F.Supp.2d 1104 (E.D.Cal. 03/16/2009))

"The party filing the motion bears the burden of establishing that a non-joined party is indispensable. See *Axiom Worldwide, Inc., v. Becerra*, No. 08-cv-1918-T- 27TBM, 2009 WL 1347398 at *3, (M.D. Fla. May 13, 2009) (citing *Nottingham v. Gen. Am. Commc'ns Corp.*, 811 F.2d 873, 880 (5th Cir. 1987)); *F.D.I.C. v. Beall*, 677 F. Supp. 279, 283 (M.D. Pa. 1987)." (*Jones v. Penny Foreclosures, LLC*, No. 09-819 (W.D.Pa. 02/05/2010))

[59] "It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts – a practice too dangerous to the rights of defendants to admit of judicial toleration." (*Perry v. District Court*, 42 Nev. 284, 174 P. 1058 (Nev. 12/31/1918))

"Stern's arguments, without more, fail to establish that Coverall is a required party to this litigation. [...] Stern has not described what interests, if any, belonging to Coverall will be impacted if the action goes forward without joining Coverall as a party." (*Azamar v. Stern*, 662 F.Supp.2d 166 (D.D.C. 10/14/2009))

"Green argues '[r]ules 17 and 19, together with [r]ule 20, clearly make State Farm a necessary, indispensable, or at least permissible, party to be joined in the action as a real party in interest.' [...] But she fails to address how State Farm, based on the criteria set forth in rule 19(a), was a necessary party to this action. As stated before, we will not assume her 'burden of argument and research.' *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988))." (*Green v. Louder*, 29 P.3d 638, 2001 UT 62 (Utah 07/27/2001))

"The Defendants have not carried their burden. Their Rule 19(a) argument is limited to the following: '[T]he

defined "due process", where the U.S. Constitution was silent on what that meant. They have said that due process, whatever else it means, requires the opportunity to be heard, to put forth one's argument. For an opposing party, that implies the opportunity to respond in kind. That, in turn, requires proper notice: if you haven't been informed of a hearing or action, how can you make that argument to begin with? Finally, due process requires whatever the rules and laws say it does, which might mean an appeal, or the right to call in witnesses, and so on.

In a court action, a party makes a request to the court through a *motion*. Due process requires the other side an opportunity to respond. There are some exceptions, such as when there is an emergency, but the opportunity to respond should always be there, absent good cause. Lawsuits are normally long, drawn out affairs, with a lot of waiting. There are not many emergencies which justify failure to provide the opportunity to respond. Even when matters are heard and decided *ex parte* (without all of the parties) then there is supposed to be an opportunity for the missing party to challenge the decision afterwards.[62] Once the court makes a decision on a motion, it issues an *order*,[63] granting or denying the motion in

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facts of this case will establish that Mr. Ragans was not acting as an agent, servant, employee or representative of Defendants, but rather he was an independent contractor who at all times was acting on his own behalf and on behalf of the Plaintiffs . . . As the only person alleged to have made the representations at issue, Ragans would be the responsible party if Plaintiffs are entitled to . . . recovery.' (Doc. 20 at 2-3). The problem with this argument is that it relies on what 'the facts of this case will establish,' and not on what is alleged in the Amended Complaint. (Doc. 19 ¶ 9) (emphasis added). In the Amended Complaint, the Plaintiffs allege that Ragans was employed by each of the Defendants, and that the Defendants acted 'by and through' Ragans. (Doc. 15 at ¶ 7-8). The Plaintiffs thus rely on a respondeat superior or vicarious liability theory. The Defendants do not cite authority for or elaborate on their argument that Rule 19(a)(1)(A) requires Ragans's joinder to 'accord complete relief among existing parties.' " (*Jones v. Penny Foreclosures, LLC*, No. 09-819 (W.D.Pa. 02/05/2010))

[60] " 'The `interest relating to the subject matter of the action,' that makes an absent person a party needed for just adjudication, must be a legally protected interest, and not merely a financial interest or interest of convenience.' 3A James W. Moore et al., *Moore's Federal Practice* 66 19.07-1 [2.-0] at 19-99 (1993); see also *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (1986) (same); *Kenko Int'l, Inc. v. Asolo S.R.L.*, 838 F. Supp. 503 (D.C. Colo. 1993) (same). While Beech Fork has both economic and convenience interests in its § 404 permit, it has not demonstrated a legally protected interest,*fn18 in particular, either the ownership or property interest that KCA claims for it. […] *fn18 The term 'legally protected interest' is frequently used in discussions of standing. See e.g. . *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (For standing purposes, 'the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered `an invasion of a legally protected interest which is . . . concrete and particularized[.]' ') (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))." (*Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F.Supp.2d 782 (S.D.W.Va. 06/17/2002))

[61] The closest Atlas Towing came was to assert that the BLM had a right to enforce their Federal court judgment. However, they never even tried to enforce it legally by obtaining a writ of execution, and Dalton Wilson's action did not seek in any way to interfere with any legal rights of BLM: it only sought redress for illegal activities done by defendants, activities done without the authority of law. Even if it wanted to do so, the Sixth Judicial Court of Nevada has no authority to tell the Federal court not to issue a writ of execution, nor does it have the authority to enjoin the U.S. Marshal from doing his job.

[62] As part of the requirement that all parties get an opportunity to respond, the ethics rules require that all *ex parte* communications be recorded or summarized, and made available to all parties. This rule seems to be one of the most frequently ignored rules.

[63] An order which is final, which finally resolves all of the issues, is often called a *judgment*. Final orders, or judgments,

whole or in part. The order may be more than a simple decision: it may include the court's findings of facts or law. In Nevada, when the decision is made orally, from the bench, in district courts,[64] the court may ask the prevailing party in the motion to write up the order.[65] The written order must not be furnished in advance to the court.[66] The opposing party must be given an opportunity to review the order.[67] The written order as prepared by the invited, prevailing party is not expected to go beyond the spoken order, either in directive, or in findings of fact or law.[68]

As you might imagine, when a party prepares an order, the opportunity for abuse is great. For one thing, the drafting party might slip in things that weren't decided by the court, or he might omit things which were decided but which he finds inconvenient, or he might distort language here and there a little to achieve some result unintended by the judge.[69] Furthermore, a lazy judge might be tempted to sign any orders prepared in advance, to avoid the difficulty of struggling with the issues himself. (Of course, he would only do this for a worthy cause. Yeah, right.) Issues related to this procedure have been argued before the Nevada Supreme Court several times. The rulings are clear: orders are *not* to be prepared before the court renders its decision, they are *not* to go beyond what the court decided, and the other party *must* have a chance to respond to the proposed order.

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in the rules of civil procedure, can be appealed. If the issues are severable, and can be decided without affecting each other, then there may be more than one final decision in a single case, but this is an unusual situation which requires special determination by the court. (See NRCP 54(b)) Also, until a final decision is made, a court can reverse its own decisions, deciding an issue one way, then deciding the same issue another way. As in the *Götterdämmerung*, *i*t ain't over till the fat lady sings.

[64] Neither justice courts nor the Supreme Court have comparable rules; the judges or justices are expected to write the orders themselves. This rule allowing the court to ask the prevailing party to draft the written order is not part of the rules of civil procedure, it is part of Nevada's District Court Rules (DCR). Other jurisdictions have different rules.

[65] "The counsel obtaining any order, judgment or decree shall furnish the form of the same to the clerk or judge in charge of the court." (DCR 21)

Obviously, the order cannot be furnished until it is first obtained. The courts see it this way, as shown below.

[66] "Under the rule, the district court must make a ruling and state its findings of fact and conclusions of law before the State can draft a proposed order for the district court's review." (*Byford v. State*, 123 Nev. 67, 156 P.3d 691 (Nev. 04/12/2007), emphasis added)

[67] "Nevada Code of Judicial Conduct (NCJC) Canon 3B(7) requires the district court to 'accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard.' The commentary on this section, which provides guidance to the district court on its ethical obligations, specifically notes that the district court may request a party to submit proposed findings of facts and conclusions of law, but it must ensure that the 'other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.' Such review is important to ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings." (*Byford v. State*, 123 Nev. 67, 156 P.3d 691 (Nev. 04/12/2007))

[68] "Although Nevada is a notice pleading jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an opportunity to respond. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979). In the present case, the only matters before the district court were the visitation schedule and the issue of whether one half of George's health insurance payments could be credited against his support payments. By waiting until the submission of the proposed order to address child support abatement, the sharing of child visitation transportation costs, and changing the due date of support payments, George effectively denied Christie an opportunity to respond. Therefore, those three issues were not properly before the district court." (*Anastassatos v. Anastassatos*, 112 Nev. 317, 913 P.2d 652, (April 3, 1996))

[69] That a lawyer might not be scrupulously honest is probably inconceivable to most readers, but, hey, it can happen.

This is part of due process. As with other questions related to process, the Nevada Supreme Court has declared that, when due process has been denied, the remedy is to do it over again right, regardless of whether or not the outcome would be the same. That is what the Nevada Supreme Court has done in appeals, when the district court below failed to follow the rules.[70] In the interests of justice, the rules are not to be taken lightly.[71]

Forgeron knew, of course, that preparing orders in advance was forbidden, and Montero knew, of course, that it was wrong to sign them. They're both lawyers, they're expected to know the law. So what happened next? Of course, Hy Forgeron prepared, in advance, the order to lift the default, and Michael Montero signed it. It was prepared so far in advance, that it was prepared before the 10 May 2011 hearing. In other words, Forgeron had decided *before the hearing* what Montero was going to do, and Montero did it. The order Forgeron prepared contained a lot of things which weren't even discussed in the hearing, let alone decided by Montero, so it clearly violated the ruling that requires that a prepared order not go beyond the court's findings. It appears that Montero acted as Forgeron's lackey, doing as he was told.

The term *kangaroo court* applies to a sham proceeding where the outcome is determined in advance. It supposedly comes from the way a court leaps over essential process, as a kangaroo would leap over an obstacle.[72] Although most authorities say that the idea of a kangaroo court is based on "leaping", we've often wondered if it weren't based on "pockets", such as kangaroos have, as in "the judge is in his pocket".

When Judge Montero signed the prepared order, Dalton Wilson protested. Forgeron then had the audacity to question by what rule Dalton Wilson challenged the order. The record does not seem to provide an answer. Nor, however, does it allow Forgeron and Montero to have subverted due process in the first place. Dalton Wilson later submitted another motion, citing the Nevada Supreme Court

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[70] "After our vacatur and remand of the district court's prior order, the district court should have reconsidered Byford's claims as instructed, conducted an evidentiary hearing if necessary, issued a new ruling, and either drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order. None of this occurred here. The State prematurely drafted a proposed order before the district court notified the parties of its new ruling after reconsideration. In addition, the district court and the State should have provided Byford with an opportunity to review and comment upon the proposed order. Accordingly, we vacate the district court's order and remand the matter to the district court for proceedings consistent with this opinion." (*Byford v. State*, 123 Nev. 67, 156 P.3d 691 (Nev. 04/12/2007))

[71] "The truth is that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost everything else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the court to enforce these rules, which are for the general good, even if they occasion inconvenience and loss in particular cases." (*State v. Vaughan*, 23 Nev. 103, (Nev. 12/31/1896))

[72] Despite kangaroos being indigenous to Australia, the term seems to be American. The Australian legal system has much in common with our system, but, presumably, the Ozzies have too much respect for marsupials to compare them with lawyers and judges.

opinions contrary to what was done, but it has so far been ignored. Avoiding and ignoring the elephant in the room seems to be a common way that courts do injustice, and Montero's court is no exception.

One of the bases for the foregoing rules about orders prepared by the parties, is the idea that the court is to make the decisions. When a party makes a decision, then due process is denied. The same principle is one basis for a rule about affidavits, that they should contain no conclusions.

An affidavit is used when it is not practical to question a witness. This is especially important in the beginning phases of an action, when the court must make decisions about adding parties, whether the court has jurisdiction, and so on, before the time when witnesses are called, depositions are taken, and so on.[73] With an affidavit, the affiant makes a sworn statement regarding some facts, and the court is asked to accept those facts, usually as part of considering some motion. Since affidavits are made without the opportunity for the other party to question or otherwise to confront the affiant, and because of the danger of denying due process, certain rules apply to affidavits, and if it appears from the record (maybe an opposing affidavit) that there is a genuine conflict among the parties, then the court should conduct a hearing or take the issue to trial (where witnesses can be cross-examined) rather than to try to resolve it using affidavits.

A court is not supposed to make assumptions regarding facts. For a court to assume that either party is truthful or dishonest is bias. So, when a witness is questioned, the party should always establish a *foundation* for the testimony, and *competency* of the witness to testify. The foundation is the preliminary information relating to the admissibility of the testimony or evidence. For example, if a witness says there was a blue car parked in front of Joe's Beanery, that statement by itself isn't very significant. Maybe the witness only heard that from someone else, and maybe that other person was dishonest or only joking. The statement may be only hearsay, and therefore not ordinarily admissible. Therefore, additional information, such as the witness's statement that she was walking down the street on the way home from work and saw the car herself, is required to give the statement about the car admissibility. Without a foundation, a court is supposed to ignore a witness's testimony as inadmissible. The same principle applies to affidavits. If an affidavit does not provide a foundation, then the affidavit is to be ignored. It is not enough, for example, to say that Sam was late for work, without a foundation such as "I came in for dinner everyday after work, and Sam was usually there behind the bar at seven, but he did not arrive that night until eight."

Just as important, a witness is not supposed to draw conclusions except under certain limited circumstances. Maybe Sam really didn't start work at eight each night, maybe he came into the restaurant early most nights to chat up one of the waitresses. It might have something to do with his dead wife. You know, the one who died the night he didn't show up until eight. So, for the witness to

[73] "Factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits. Oral testimony may be received at the hearing with the approval of the court, or the court may set the matter for a hearing at a time in the future and allow oral examination of the affiants to resolve factual issues shown by the affidavits to be in dispute." (DCR 13.6)

conclude that Sam's shift began at seven would be misleading. An *observation* that he usually arrived at seven is more factual, and less conclusory. When a court takes a witnesses conclusions as facts, the law sees that as a subversion of due process, since the judge is abdicating his role as judge. Effectively, the judge is letting the witness do his job. Parties do not come into court to be judged by witnesses, they come into court to be judged by the court.

Just as the conclusions of live witnesses are not admissible, the conclusions of an affiant are not admissible. Because the affiant cannot be cross-examined without a hearing, there are various rules for affidavits to prevent abuse.[74] In addition to the rules, there are a lot of court decisions interpreting those rules.[75] Generally, the decisions interpret the rules strictly.

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[74] DCR 13.5 gives the requirements for affidavits in motions:

> "The affidavits to be used by either party shall identify the affiant, the party on whose behalf it is submitted, and the motion or application to which it pertains and shall be served and filed with the motion, or opposition to which it relates.
>
> "Affidavits shall contain only factual, evidentiary matter, shall conform with the requirements of NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part."
>
> NRCP 56(e) specifies requirements for affidavits used with summary judgments. In other words, the standard for summary judgments is the standard for affidavits in all motions.
>
> "Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." (NRCP 56(e))

[75] Some interpretations by the Nevada Supreme Court:

> "[W]e have examined Bryant's affidavit to determine if it supports the lower court's judgment, and have found that it offends NRCP 56(e) in a number of respects. Although the affidavit refers to the life insurance policy in issue, as well as to other documents, no sworn or certified copies thereof were "attached thereto or served therewith" as explicitly required by that rule. Indeed, Bryant's affidavit does not even show that he is the custodian of any company records, and competent to lay a foundation for introduction of the policy or any other document. Certainly, his capacity as "Vice President and Claims Manager" carries no such necessary inference. Quite aside from considerations relating to the affidavit's attempt to adduce incompetent, secondary proof of the content of documents, requisite foundation is lacking to show Bryant's competence to testify to any of the affidavit's other recitals. *Dredge Corp. v. Husite Co.*, 78 Nev. 69, 369 P.2d 676 (1962). Furthermore, most of these recitals are inadmissible conclusions for which no foundation could possibly be laid, and that in the form presented certainly do not constitute "such facts as would be admissible in evidence." *Bond v. Stardust, Inc.*, 82 Nev. 47, 410 P.2d 472 (1966); *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 414 P.2d 106 (1966). […] [Affidavits] must present admissible evidence, and must not only be made on the personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted. When written documents are relied on, they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient. Rule 56(e), Rules of Civil Procedure; 3 Moore's Federal Procedure Under the New Rules, p. 3175 et seq." (*Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 482 P.2d 814 (Nev. 1/28/1971))

If it sounds as if too much time is being spent on affidavits, foundations, witnesses, and so on, remember that the raw material of a case consists of two things: facts and law. In engineering, to have safe and reliable airplanes or electronic equipment or medical instruments, you must get a design and manufacturing right. In medicine, to keep and to make people healthy, you must get diagnoses and treatments right. In law, in order to have a just outcome, you must get facts and law right; procedures and rules are the methodologies by which this is done.[76] If a motion, complaint, allegation, defense, or other procedure is based on fact, and the fact is not established, then the court has no business accepting the unsubstantiated fact. Specifically, if a motion is based on an improper affidavit, then no just court should entertain that motion. A judge which allows improper procedure with respect to substantial, material issues, is dishonest, incompetent, lazy, or just plain stupid. The same goes for an attorney or party who instigates such improper procedure.

Now, consider a typical Forgeron-style affidavit in *Wilson v. Atlas Towing*: "I have read the foregoing motion and agree that all of the facts expressed therein are correct." OK, how many problems can you see with that affidavit? (Montero found none, and allowed the affidavit, so if you found at least one, you may be a better judge than he is.) Here are the problems:

> The affidavit consists only of a conclusion ("it's all good!"), and contains no facts. It should be the other way around.
>
> Rather than basing the motion on the affidavit, the motion was written first, and there is a presumption that the facts were selected to fit the argument, rather than the other way around.[77]

"In short, the allegations made by Catrone in his affidavit could not be the subject of his testimony at trial unless a foundation as to competency could first be established. This foundation is lacking in the record. We must therefore conclude that the Catrone affidavit is ineffectual for the purpose of creating a genuine fact issue [...]" (*Catrone v. 105 Casino Corp.*, 82 Nev. 166, 414 P.2d 106 (Nev. 5/13/1966))

"NRCP 56(e) requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Moreover, sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith. When the mandate of this rule is not met the court will regard the papers as legally insufficient. *Saka v. Sahara-Nevada Corp.*, 92 Nev. 703, 558 P.2d 535 (1976); *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 414 P.2d 106 (1966)." (*Gunlord Corp. v. Bozzano*, 95 Nev. 243, 591 P.2d 1149 (Nev. 3/16/1979))

[76] The law which creates rights and obligations is *substantive* law. The law which provides mechanisms to enforce those substantive laws, or to provide remedies when substantive laws are broken, is *procedural*, *remedial*, or *adjective* law. A law against assault is substantive. The mechanisms used to jail the assailant follow procedural law.

[77] Even Hollywood scriptwriters know this is wrong. If it were a live witness, and this were a soap opera or courtroom drama, you would see the opposing attorney jump up and complain, "Objection! Leading the Witness!" An illustration from the Coen Brothers' version of *True Grit*:

> Lawyer: (to Cogburn) "How much money was in the jar?"
> Cogburn: "I saw $150."
> DA: "Objection, leading the witness."
> Judge: "Sustain."
> Lawyer: "What did you do then?"

> There is no foundation. Where did the affiant get her knowledge? Why should it be admissible? (Trust us: there was no foundation in Forgeron-style motion, either.)
>
> How do we know that the affiant even *understood* the statements made in the motion? Did the affiant catch all of the statements of fact while reading the motion, or did she miss one or two? Does the affiant know the difference between a fact and a conclusion? Between law and fact? (A lot of people often can't tell which is which.) Personally, we don't trust most lawyers to read and interpret a legal document such as a motion, so we certainly don't trust a random witness. Do you trust the average layman to understand a legal document, and to draw conclusions about its contents?
>
> Even though lawyers usually prepare affidavits for signature, the reader of this affidavit gets no idea about the credibility of the affiant from the language used. When an affidavit consists of a bunch of legalese, it may be lawyer hooey, and not what the affiant knew as facts. It's not very credible.

There are some specific terms used in affidavits, which describe the basis for the statements made by the affiant. When an affiant has "personal knowledge", his knowledge is original, and does not come from someone else (by hearsay, information,[78] or otherwise). "Information and belief" is always second or third hand, coming from somewhere or someone else.

Remembering, now, that the court is supposed to understand the basis for a witness's knowledge, so that some conclusion can be drawn as to its credibility and value, consider this passage from an affidavit of Hy Forgeron: "All of the factual allegations relating to the Federal Court proceedings are true and correct of Affiants [*sic*] own knowledge, save and except such matters as are set forth on information and belief, and as to any such matters, Affiant believes them to be true."[79] In other words, "I may know this directly, or I may have gotten it from somewhere else, I'm not saying which or where, but I believe it."[80] What is a court to make of a statement such as that? Besides the ambiguity, the affidavit is conclusory: it draws a conclusion rather than stating facts. Such an affidavit should be inadmissible, but Judge Montero didn't notice or complain, and allowed the motion to which it was attached.

Naturally, there are many binding court opinions[81] regarding the admissibility of affidavits, and what

Cogburn: "I went to the jar and saw the $150."

[78] As a term of art, *information* implies some type of communication. The English word originally came from Latin *informare* (to shape, form, train, or educate). In legal usage, it retains some of this sense, to distinguish it from personal knowledge, which does not come from someone else.

[79] Defendant's Motion to Set Aside Default, 25 March 2011, pg. 19.

[80] In fact, there is no reason to believe that Hy Forgeron was actually present at, or involved with, the aforementioned Federal court proceedings, so Forgeron probably got *all* of that information second hand.

[81] In Nevada, the opinions of the Nevada Supreme Court, and the opinions of the United States Supreme Court, are binding, which means that it is mandatory for the other courts (district courts, municipal courts, and justice courts) to

standards apply. Forgeron's affidavits don't pass muster. Once again, Dalton Wilson cited some of those case opinions to Montero, and Montero has so far ignored that elephant, as well.

As was explained earlier, there are two ways in Nevada to sue people whose names you don't yet know: you can call them "Does" (or "Roes" or whatever) in the complaint and change the names when the real names become known, or you can join them to the action after their names become known. The process of giving a true name to a Doe requires that the original complaint be amended. In order to sue Does, the law requires that the complaint meet certain requirements.[82] For example, it must describe the Does in some way. For example, a complaint might describe "John Doe" as "the unidentified person who broke into Plaintiff's apartment in December". The other main requirement is that the plaintiff be diligent in trying to ascertain the true names of the Does.

Amending a complaint by a plaintiff may be done once as a matter of right at any time before the defendant answers.[83] After that time, however, the court's approval, or the other party's approval is required. The court is expected to give approval freely when required by the interests of justice. When the amendment is to substitute a true name for that of a Doe, the aforementioned conditions must be met. Otherwise, leave to amend requires no specific conditions, except the interests of justice.

In June 2011, Dalton Wilson amended his complaint to include some additional allegations, and to add some new defendants, notably Lander County. At the time, no defendants had answered the complaint.[84] (Remember, the 10 May 2011 order, written by Forgeron himself, gave Atlas Towing twenty days to answer.) Although Dalton Wilson had a right to amend his complaint without approval of the court,[85] Forgeron filed a few motions questioning that right, so Dalton Wilson in another motion sought the court's permission.

Although Dalton Wilson was amending his complaint, the amendment included, in effect, either a joinder of a new party or the substitution of named persons for some of the Does. As also explained above, the joinder of additional parties may be done at any time for good reason, As the complaint explained, the proposed new parties were joint tortfeasors, which is a good reason, about as good as they come. The court never ruled on Dalton Wilson's motion for leave to amend the complaint, even though he had a right to amend it without any motion whatsoever.

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take them as law.

[82] *Nurenberger Hercules-Werke v. Virostek*, 107 Nev. 873, 822 P.2d 1100 (Nev. 12/06/1991)

[83] NRCP 15(a)

[84] Note that the December 2010 letter from Nick Ayers, called an "answer" by the clerk, was not notarized, and therefore it had "no force or effect", by DCR 20.

[85] "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.[...]" (NRCP 15(a))

Dalton Wilson's amendment added Sadie Sullivan to the complaint. She previously worked for Atlas Towing, and was added for that reason, not because she is now County Clerk. The County Clerk in Lander County also acts *ex officio* as the District Court Clerk. Mostly the duties of the court clerk are ministerial.[86] However, the court clerk has influence on scheduling, and is privy to a great deal of information that should not normally reach the outside of the clerk's office and judge's chambers. This creates the possibility of a conflict of interest, because the court clerk as a party has a possible leg up on any other party who is not the clerk.[87]

In order to preserve respect for the courts, and in order to avoid possible temptations for malfeasance (even where no corruption is shown),[88] the standard for judicial conduct is not merely to avoid conflicts of interest, it goes beyond this to require avoidance of mere appearance of possible conflict of interest.[89] The same code of judicial conduct requires judges to enforce those standards on his or her own staff.[90] Under this standard, Dalton Wilson filed a motion to disqualify the clerk of the court for this case,

[86] The function of a district court clerk in Nevada is largely ministerial. "Historically, the position of court clerk has always been recognized as a ministerial function of a judicial system." (*State ex rel Harvey v. Second Judicial District Court of the State of Nevada*, 117 Nev. 754, 32 P.3d 1263 (Nev. 10/10/2001)) However, the office involves some exercise of discretion, and with that discretion comes the potential for abuse.

For example, "All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk;..." (NRCP 77(c)) The clerk is also agent for sureties. (NRCP 65.1). In all of these matters, and also in the other matters which are mandated by the rules, the clerk's discretion extends to timing. Although the clerk must, by the rules, perform certain acts, there is no requirement that they be done immediately.

[87] Most significant is the setting of the schedule and calendar. In Nevada's district courts, clerks are given a great deal of latitude in setting dates, granting continuances, and other scheduling matters. While these procedures are lawful, it is possible that the timing of them may constitute abuse of discretion. "[...] even if a legal step taken or legal procedure pursued has justification in law, the timing thereof may be oppressive and may constitute harassment if it unjustifiably neglects or ignores the legitimate interest of a fellow attorney." (*Tenderloin Housing Clinic Inc. v. Sparks*, 8 Cal. App. 4th 299, 10 Cal. Rptr. 2d 371 (Cal.App.Dist.1 07/02/1992))

Along with the temptation to abuse the scheduling process and other matters, the clerk of the court is privy to a great deal of information which can give her an unfair tactical advantage in proceedings.

[88] Ethics rules are designed to *avoid* problems, not to be invoked once problems are shown to exist. "It is of course absurd to interpret a criminal statute on the basis of one's perception as to whether its 'spirit' has been violated; and doubly absurd to interpret a prophylactic measure on the basis of whether the evil against which the prophylaxis was directed in fact exists." (*Crandon v. United States Boeing Co.*, 110 S. Ct. 997, 494 U.S. 152 (U.S. 02/27/1990)) There is no requirement to show that an actual problem exists with the clerk, merely that such a problem might exist.

Nevada has explained the need to avoid conflict of interest as a requirement to avoid even the mere *temptation* of bias. In a discussion regarding judicial ethics, it said, "The Due Process Clause also prohibits a judge with a direct interest in a case from participating in its resolution. The Supreme Court has explained that an interest is disqualifying under the Due Process Clause if it 'would offer a possible temptation to the average . . . judge . . . not to hold the balance nice, clear and true.' *In Re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))." (*Hogan v. Warden*, 112 Nev. 553, 559-60, 916 P.2d 805, 809 (1996))

[89] "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonable be questioned [...]" (NCJC 2.11(A))

[90] "A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." (NCJC 2.12(A))

asking the court to appoint an interim, *pro tempore* clerk for the *Wilson v. Atlas Towing* case.

We have now reached early June, 2011, when Dalton Wilson amended his complaint to add some claims and some parties. Some of the parties added included Lander County, and various Lander County employees. Although the Complaint does not explain the role of each defendant in the alleged actions and inactions, it appears that Dalton Wilson assigns some culpability to Lander County because of the County's failure to take action to prevent the crimes and torts.

Part II of this story will pick up at the amended complaint. It will cover fun legal topics like discretionary immunity, and a new cast member (Rebecca Bruch, alleged attorney for the County and its employees), the Angela Elquist mystery (why is she not representing the County, as is her job?), and other events leading up to and including the 15 September 2011 hearing. The elephants are in the room, we're ready for a circus. Has anybody noticed? Or will the Great Montero attempt his Disappearing Act?

Meanwhile, if you think this has nothing to do with you, perhaps you ought to reconsider. If you have grazing rights, or use Federal land, or expect the laws to be enforced in Lander County, or are concerned about wild horses on BLM land, or oppose the closure of some of the roads on public lands, or have an interest in mining or ranching, or environmental laws, or if you hunt, or if you have an opinion about designating some areas as wilderness, or if you use public land for recreation, then perhaps you should be concerned. This story is about government, about process, and about how laws are enforced or ignored. It affects everyone, including you.

Comments or questions may be sent by e-mail to *editor@tatanka.com*.

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