

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONOVINE MATHEWS,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

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Elizabeth A. Brown
Clerk of Supreme Court
Case No. 72701

MOTION TO REISSUE ORDER AS AN OPINION

Comes Now Appellant DONOVINE MATHEWS, by and through Chief Deputy Public Defender DEBORAH L. WESTBROOK, and files this Motion to Reissue Order as an Opinion. This Motion is filed pursuant to **NRAP 27** and **NRAP 36** and is based upon the following Memorandum of Points and Authorities and all papers and pleadings on file herein.

DATED this 7th day of August, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

On July 26, 2018, a panel of this Court issued an Order of Reversal and Remand, holding that the district court abused its discretion by excluding Appellant's expert rebuttal witness (a biomechanical engineer) and by rejecting Appellant's proffered jury instruction on his accident theory of the case. See Mathews v. State, No. 72701, 2018 WL 3625710, *4 (July 26, 2018) (unpublished). Appellant hereby moves this Honorable Court to reissue the unpublished order in this case as an opinion to be published in the Nevada Reports.¹

A motion to reissue an order as an opinion must be based on one or more of the criteria for publication set forth in Nevada Rule of Appellate Procedure (NRAP) 36(c)(1). See NRAP 36(f). A decision of this Court is suitable for publication where it “[p]resents an issue of first impression”, “[a]lters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals” or “[i]nvolves an issue of public importance that has application beyond the parties.” **NRAP 36(c)(1)**. This Court will upgrade a dispositional order to published authority where appropriate. See Brown v. Eighth Jud. Dist. Ct.,

¹ Appellant's motion was timely filed within 15 days after the court filed the unpublished order (*e.g.*, on or before August 10, 2018). See NRAP 36(f).

133 Nev. Adv. Op. 113, 415 P.3d 7, 8 n.1 (2017). In this case, all three factors support publication.

The Court's unpublished order in Mathews applied Nevada's seminal expert witness case, Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008), in the context of a criminal trial and explained for the first time how district courts must evaluate Hallmark's "assistance requirement" when ruling on the admissibility of a rebuttal defense expert. See Mathews at*4-5. This was an issue of first impression in Nevada that warrants publication. See **NRAP 36(c)(1)(A)**.

The Court's unpublished order announced a new rule when it held that "the 'assistance requirement' must be assessed in the context of what the burden of proof is and who bears that burden." Mathews, at *4. The Court's unpublished order directed district courts to consider the purpose of the proffered expert testimony when ruling on a motion to strike, and held that the failure to do so could constitute an abuse of discretion. See Mathews, at * 5 (court abused its discretion by "fail[ing] to consider the purpose for which Mathews was offering Dr. Johnson's testimony, which was to rebut the State's theory that Mathews intentionally burned C.J.").

In addition to resolving these issues of first impression, the Court's unpublished order clarified that biomechanical experts can be qualified

expert witnesses, notwithstanding language in **Hallmark** and **Rish v. Simao**, 132 Nev. Adv. Op. 17, 368 P.3d 1203 (2016), which seemed to suggest otherwise. See **Mathews**, at *5-6 (“Thus, biomechanical experts are not precluded from testifying altogether, and weaknesses in a purported expert’s testimony, including that one expert may have lesser qualifications than the opposing party’s expert witness, ‘goes to the weight, not the admissibility of the evidence.’”). This decision should be published because it significantly clarifies a previously announced rule of law and will prevent future arguments seeking to exclude biomechanical engineers as unqualified as a matter of law. See **NRAP 36(c)(1)(B)**.

Finally, the decision should be published because it addresses “an issue of public importance that has application beyond the parties”: how courts should apply **Hallmark** when the State seeks to exclude a defense expert witness at trial. See **NRAP 36(c)(1)(C)**. The new rules and clarification offered by this Court’s unpublished order will promote judicial economy if reissued as a published opinion by making the holdings more readily available to future practitioners and district court judges.

To date, there are only twelve (12) published Nevada opinions that address the **Hallmark** decision, and only three (3) of those are criminal

cases.² There is little-to-no precedential guidance available to district court judges who are ruling on motions to strike defense expert witnesses in criminal trials. See Rupley v. State, 93 Nev. 60, 61 fn. *, 560 P.2d 146, 147 fn.* (1977) (an unpublished disposition may be elevated to precedent “[b]ecause of the paucity of published authority on the issues”).

If published, Mathews would be the first decision explaining what an abuse of discretion looks like when a judge improperly excludes a criminal defendant’s expert under the Hallmark standard. None of the three published criminal cases ever undertook such an evaluation. See Higgs v. State, 125 Nev. 1043, 222 P.3d 648 (2010) (applying Hallmark factors to State’s expert and ruling that the district court did not abuse its discretion by admitting the State’s expert); Brant v. State, 130 Nev. Adv. Op. 97, 340 P.3d 576 (2014) (where defendant made an insufficient expert witness proffer, the Supreme Court lacked sufficient information to determine if the

² See, e.g., Brant v. State, 130 Nev. Adv. Op. 97, 340 P.3d 576 (2014); Perez v. State, 129 Nev. Adv. Op. 90, 313 P.3d 862 (2013); Higgs v. State, 125 Nev. 1043, 222 P.3d 648 (2010); Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. Adv. Op. 37, 396 P.3d 783 (2017); Khoury v. Seastrand, 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016); Rish v. Simao, 132 Nev. Adv. Op. 17, 386 P.3d 1203 (2016); LVMPD v. Yeghiazarian, 129 Nev. 760, 312 P.3d 503 (2013); Leavitt v. Siems, 130 Nev. Adv. Op. 54, 330 P.3d 1 (2014); L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 37 (2014); FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183 (2014); Williams v. Eighth Jud. Dist. Ct., 127 Nev. Adv. Op. 45, 262 P.3d 360 (2011); Cramer v. State, DMV, 126 Nev. 388, 240 P.3d 8 (2010).

district court abused its discretion by excluding defense expert); **Perez v. State**, 129 Nev. Adv. Op. 90, 313 P.3d 862 (2013) (applying **Hallmark** factors to determine whether the State’s expert was properly admitted at trial and affirming the appellant’s convictions). The publication of this Court’s decision in **Mathews** will help prevent similar errors from occurring in the future, and will serve as a guidepost for judges who are ruling on motions to exclude defense experts.

Finally, publication will not require any textual revisions in order to analyze issues not included in this Court’s Order of Reversal and Remand. The Court’s Order is couched in general terms which will provide guidance to district courts as to how they must analyze the “assistance requirement” and other **Hallmark** factors going forward. As such, the concern expressed by **NRAP 36(f)(4)** is not applicable here.

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CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court convert the Order of Reversal and Remand, filed July 26, 2018, into a published opinion.

DATED this 7th day of August, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7 day of August, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
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DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office