NEVADA
Legal Update
Winter 2014

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Highlights

Rule 16.1 of the Nevada Rules of Civil Procedure Requires Disclosure of Any Insurance Agreement Which May be Liable to Pay a Portion of a Judgment

The Nevada Supreme Court held that the plain language of NRCP 16.1(a)(1)(D) required disclosure of any and all insurance agreements that may be liable to pay a portion of a judgment. The court held disclosure was required even when a party had already disclosed insurance policies with limits that exceed that party's potential liability.

Automobile Accident Results in Recovery for Both Plaintiff and Defendant

The plaintiff and defendant filed claims against one another arising out of an accident on southbound U.S. 95, north of Las Vegas, Nevada. The plaintiff's semi-tractor trailer truck was parked on the shoulder of the roadway when it was struck from behind by the defendant. Both parties alleged personal injuries, including cervical, thoracic and lumbar spine injuries.

Plaintiffs Awarded $56,000.00 for Defendant's Failure to Disclose

The jury in a construction defect action returned a verdict for the plaintiff on his claim that the defendant failed to disclose an adverse condition when plaintiff purchased the subject residence. The plaintiff specifically alleged that the defendant failed to disclose an adverse condition in the tile flooring system prior to the sale.

Nevada Supreme Court Decisions

Civil Procedure

The Nevada Supreme Court Clarifies the NRCP 16.1 Insurance Disclosure Requirements

The Aventine-Tramonti Homeowners Association filed a construction defect action against Vanguard Piping Systems, Inc., Viega, LLC, Industries, Inc., and Viega, Inc. (collectively, Vanguard) and Vanguard's German parent companies Viega GmbH and Viega International GmbH. In June 2012, the Nevada Supreme Court issued a stay of proceedings as to the German parent companies, but not Vanguard. During discovery and pursuant to rule 16.1(a)(1)(D) of the Nevada Rules of Civil Procedure, Vanguard disclosed its primary insurance agreements to Aventine-Tramonti. Aventine-Tramonti subsequently learned that Vanguard may have been covered by additional undisclosed polices purchased by the German parent companies and sought their disclosure. The special master ordered Vanguard to disclose these agreements after it initially refused.

Vanguard objected to the special master's order and sought relief from the district court. Vanguard asserted that producing the agreements would violate the stay against the German parent companies and that it had complied with NRCP 16.1(a)(1)(D) when it disclosed its primary insurance agreements that sufficiently covered any potential judgment against it. The special master's order was affirmed by the district court, which held that the rule required disclosure of any insurance agreement that may be used to satisfy a judgment. Vanguard petitioned the Nevada Supreme Court to determine whether NRCP 16.1(a)(1)(D) compels disclosure of all insurance agreements, whether or not the policy limits exceed the amount of potential liability or provide secondary coverage.

Vanguard asserted that it should not be required to disclose the insurance policy agreements purchased by its parent companies as Aventine-Tramonti sought their disclosure for the improper purpose of using that information in other pending construction defect litigation against Vanguard. The Court noted, however, there was no prohibition against using discovery in later unrelated litigation as long as the discovery was relevant to the current litigation.

The Nevada Supreme Court relied on the plain meaning of NRCP 16.1(a)(1)(D) which stated that the parties "must" disclose "any insurance agreement" that "may be liable to satisfy part or all of the judgment." The rule did not specify only insurance agreements with policy limits that were sufficient to satisfy a judgment. In addition, the rule did not distinguish between primary and secondary insurance policies. The plain language therefore required disclosure of any and all insurance agreements that may be liable to pay a portion of the judgment, despite the fact that a party previously disclosed policies with limits that exceed that party's potential liability. The Court further held that NRCP 16.1 also required disclosure of disclaimers and limitations of coverage.

In This Issue

The Court also looked to Rule 26 of the Federal Rules of Civil Procedure, the federal counterpart to NRCP 16.1, and found that its interpretation was consistent with that of the federal courts. Federal cases interpreting the disclosure requirements were strong persuasive authority because of the similarity in language between the two statutes. Federal cases have broadly interpreted FRCP 26 and required the disclosure of reinsurance agreements, which are farther removed from primary liability than a secondary insurance agreement. The federal courts also maintained that the rule's language was mandatory. As such, the federal courts have rejected efforts to limit disclosure to only those agreements that a party deemed relevant.

The Nevada Supreme Court agreed with the federal courts' approach. The Court also noted that it would be impossible to determine all possible circumstances in which primary policies would be subject to liability and possibly exhausted by other judgments. Because NRCP 16.1 required disclosure of any insurance agreement which may be liable to pay a portion of the judgment, Vanguard's writ petition was denied. *Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. Advance Op. 63, September 19, 2013.*

Indemnity/Contribution

NRS 17.245(1)(b) Bars All Claims that Seek Contribution and/or Equitable Indemnity When the Settlement is Determined to be in Good Faith

The Nevada Supreme Court exercised its discretion and chose to consider a Writ of Mandamus regarding two issues: 1) Whether NRS 17.245(1)(b) bars "de facto" claims for contribution and/or equitable indemnity if a defendant settles in good faith; and 2) whether the contractor's third party claims in this matter were considered "de facto" contribution and/or equitable indemnity claims that were barred under the statute. The issue of law was a matter of first impression.

The petition arose from litigation concerning a fatal motor vehicle accident which occurred at a construction site in Las Vegas. Cheyenne Apartments, Pacificap Holdings, Pacificap Properties Group, Chad Rennaker, and Jason Rennaker (collectively P&R) were the owners and developers of the construction site and Pacificap Construction Services (PCS) was the general contractor. Otak Nevada, an architecture firm, entered into an agreement with P&R to design a multifamily housing project. Orion Engineering and Surveying was hired by Otak to design and implement necessary off-site construction. Specifically, Orion was to design four traffic medians to be installed in the intersection adjoining the construction site and replace traffic markers to alter the flow of traffic. One median was not installed and the traffic markers were not replaced, which allegedly caused the fatal motor vehicle accident.

Following the accident, the plaintiffs filed complaints against P&R and PCS, and later amended their complaints to add Otak as a defendant. Otak and the plaintiffs subsequently reached a settlement agreement in which the plaintiffs agreed to dismiss all of their claims against Otak for $45,000.00 and assignment of Otak's experts. Otak filed a motion for determination of good-faith settlement, pursuant to NRS 17.245. The district court denied the motion finding the $45,000.00 settlement was not a fair settlement amount and therefore not in good faith. After additional settlement negotiations, Otak and the plaintiffs agreed to a settlement in the amount of $210,000.00 and the assignment of Otak's experts. Otak filed an amended motion for good faith settlement, which was opposed by PCS and P&R who contended the proposed settlement amount was far less than Otak's insurance limits or potential liability and would unfairly shift its liability to the remaining defendants.

Despite PCS and P&R's opposition, the district court granted the motion for good faith settlement, but also granted P&R leave to file a third-party complaint against Otak. P&R's third-party complaint asserted claims for breach of contract, express indemnity, express contribution, breach of the covenant of good faith and fair dealing, professional negligence and punitive damages. Otak moved to dismiss P&R's third-party complaint on the ground that the claims were barred by NRS 17.245. Otak argued that the statute barred all claims that were "de facto" contribution and/or equitable indemnity claims. The district court declined to dismiss the complaint in its entirety, but it did dismiss P&R's claim for professional negligence.

On appeal to the Nevada Supreme Court, Otak argued that the district court erred when it declined to dismiss P&R's third-party complaint in its entirety. Otak maintained that the third-party claims were "de facto" contribution and equitable indemnity claims that were barred by NRS 17.245(1)(b). NRS 17.245(1)(b) provides that a good faith settling defendant cannot be liable "for contribution and for equitable indemnity to any other" non-settling defendant. The rule does not state whether the bar is exclusive to claims titled as "contribution" or "equitable indemnity" or if it encompasses all theories of recovery that seek contribution or equitable indemnity, notwithstanding the actual title of the claim. Originally, NRS 17.245 barred a non-settling defendant from seeking contribution from a settling defendant; however, the Nevada Legislature amended the rule to bar equitable indemnity with the intent to promote and encourage settlements among joint defendants. The Court concluded that allowing a non-settling defendant to seek contribution or equitable indemnity damages under the appearance of a differently named claim would defeat this legislative intent. The Court therefore held that once a defendant has settled in good faith, NRS 17.245(1)(b) bars all claims against that settling defendant that in effect seek contribution and equitable indemnity, regardless of the title of the claim.

The Court created a two-part test for trial courts to use to determine whether a claim in effect seeks contribution or equitable indemnity in violation of NRS 17.245(1)(b). Trial courts should consider: 1) whether the claim arose from the same basis or set of facts for which the settling defendant would be liable to the plaintiff; and 2) whether the claim seeks damages comparable to those recoverable in contribution or indemnity actions. With this test in mind, the Court examined whether the rule barred P&R's remaining third-party claims for express indemnity, contribution, breach of contract, breach of covenant of good faith and fair dealing and punitive damages.

Otak argued that P&R had no claim for express indemnity because the indemnity clause in their contract was actually a contribution clause and recovery would be barred by NRS 17.245(1)(b). The Court analyzed the contractual provision at issue and found only part of the provision attributed liability to Otak. The clause apportioned liability according to fault rather than shifting liability to the primary responsible party. Thus, the Court found the clause was for contribution and not indemnity. The Court reasoned that since the rule barred all contribution claims, P&R's claim for express indemnity should have been dismissed.

NRS 17.245 does not distinguish between equitable and contractual contribution. The Court noted that the Legislature could have chosen to make such a distinction when it amended the rule in 1997. Thus, it appeared to the Court that the Legislature intended for NRS 17.245(1)(b) to bar all contribution claims notwithstanding whether contribution

was equitable (implied) or contractual (express). The Court therefore concluded that P&R's express contribution claim was barred by NRS 17.245(1)(b).

Lastly, the Court considered P&R's argument that NRS 17.245(1)(b) did not bar its claims for breach of contract and breach of the covenant of good faith and fair dealing because the claims were based on Otak's alleged breach of contract. The contract provision at issue required Otak to periodically inspect the construction site and report deficiencies to P&R. The Court concluded that the alleged breach was not independent of P&R's liability to the plaintiffs, because Otak's failure to inspect the site and report deficiencies was one of the alleged causes of the accident in the first place. In addition, the Court found that P&R did not seek any damages that were unrelated to the plaintiffs' accident, nor did P&R allege that Otak breached a duty that resulted in liability to P&R on any other basis than Otak was potentially responsible for the plaintiffs' accident. The court therefore concluded that NRS 17.245(1)(b) barred P&R's claims for breach of contract and breach of the covenant of good faith and fair dealing because these claims essentially sought contribution. Since no cause of action remained, the Court necessarily concluded that P&R's punitive damages claim must also be dismissed. The district court was directed to dismiss P&R's third-party claims. *Otak Nev., LLC v. The Eighth Jud. Dist. Ct., 129 Nev. Advance Op. 86, November 7, 2013.*

Nevada Jury Verdicts

Contracts

Plaintiffs Awarded $56,000.00 for Defendant's Failure to Disclose Alleged Defect

The plaintiffs, Nevada residents, purchased a residence in Anthem Country Club from the defendant seller in July 2009. The plaintiffs alleged that the defendant failed to disclose an adverse condition in the tile flooring system prior to the sale and that defendant knew of the condition in January 2009 when he listed the property for sale. The plaintiffs alleged the defendant called non-party builder and developer Pulte to inspect the property after his neighbor informed him that Pulte was replacing cracked tiles in several other residences in the area. The plaintiffs further claimed that, after inspecting the defendant's residence, Pulte paid the defendant $41,765.30 to fix the adverse condition. The defendant allegedly used day laborers to replace the cracked tiles and conceal the alleged defect.

During trial, the plaintiffs called an accident reconstructionist who was of the opinion that the flooring system was defective and required total replacement. The defendant denied liability and asserted that no defects existed that had not been repaired prior to the sale. The plaintiffs sought $48,000.00 for the replacement cost of the floor, plus $3,500.00 in related expenses. The defendant served an offer of judgment for $25,000.00. The jury found for the plaintiffs at the end of a six day trial and awarded $50,000.00 in compensatory damages for repair/replacement costs, $5,000.00 for misrepresentation, and $1,000.00 in punitive damages. *Kohlberg and Surasky v. DeMarco, May 13, 2013.*

Plaintiff Awarded $800,000.00 for Unjust Enrichment Claim

In August 2009, the plaintiff and the defendants entered into an agreement to market timeshare properties to the defendants' customers through the defendants' website. According to the plaintiff, the defendants represented that they would enter into a long-term national agreement with the plaintiff to continue their relationship, when in reality the defendants had no intention of doing so. Rather, the defendants allegedly only made these representations in order to take and make use of the plaintiff's marketing plan and the plaintiff's knowledge of the timeshare industry.

The plaintiff alleged that the defendants used the plaintiff's marketing plan and information they obtained from the plaintiff about the timeshare industry to negotiate a contract with non-party Wyndham Vacation Resorts to market its timeshare properties through the defendants' website using the same marketing plan that the plaintiff had created. The defendants subsequently informed the plaintiff that due to their new relationship with Wyndham Vacation Resorts they would no longer work with the plaintiff. The plaintiff brought an action against the defendants, asserting various theories of liability including unjust enrichment. The defendants denied liability.

At the conclusion of a ten day trial, the jury found for the defendants on the plaintiff's claims for fraudulent misrepresentation, intentional interference with contractual relations and intentional interference with prospective economic advantage. The jury found in favor of the plaintiff on the unjust enrichment claim and awarded $800,000.00 in compensatory damages. *AAMG Marketing Group, LLC, dba Airline Alternative Marketing Group, LLC, v. Allegiant Air, LLC, dba Allegiant Airlines and Allegiant Travel Company, May 28, 2013.*

Plaintiffs Prevail on Claims for Breach of Covenant of Good Faith and Fair Dealing

The plaintiff husband was involved in a motorcycle accident and filed a claim with his insurer, defendant GEICO for underinsured motorist coverage. According to the plaintiffs, husband and wife, GEICO thereafter failed to timely pay underinsured motorist benefits even after the defendant admitted it owed the policy limits for the injuries the husband sustained as a result of the accident. The plaintiffs subsequently filed an action asserting that GEICO breached the covenant of good faith and fair dealing and was guilty of bad faith.

The plaintiffs called an insurance claims expert who was of the opinion that the defendant repeatedly fell below the industry standards and violated fair claims handling practices. The defendant denied liability asserting that the delay in payment was reasonable because it was waiting for information from the plaintiff before making a determination of value and or the issuance of funds. The defendant called an attorney and insurance standards and practices expert who testified that the defendant complied with industry standards and found only minor faults with the defendant's actions. Prior to trial, the plaintiffs demanded $250,000.00 and the defendant offered $100,000.00. After a ten day trial, the jury found for the plaintiffs and awarded the husband $400,000.00 and the wife $250,000.00 in compensatory damages. *Jordan v. Government Employees Insurance Company, July 23, 2013.*

Plaintiff Awarded $450,000.00 for Breach of Contract by Auto Insurance Company

The plaintiff husband was operating his 2007 Kia Spectra with his wife as a passenger, travelling northbound on Rancho Drive, in the center lane, toward the intersection at Torrey Pines. The defendant was operating a van southbound on Rancho Drive and negligently executed a left turn onto Torrey

Pines into the plaintiffs' path of travel. The impact spun the plaintiffs' vehicle 180 degrees and left it facing southbound in the number one travel lane. The husband's airbag deployed, but the wife's did not. At the time of the subject accident, the driver of the van was under the influence of alcohol and later died from injuries sustained in the accident. Prior to trial, the plaintiffs settled with the decedent driver, Kia Motors America, and Peoples Automotive for undisclosed amounts. The plaintiff husband settled before trial on his cross-claim with the defendant, his automobile insurance company.

The plaintiff wife maintained her claim against the insurance company, alleging it breached their contract and the covenant of good faith and fair dealing when it failed to pay her claim for underinsured motorist coverage. The plaintiff wife sustained a dislocated left shoulder, which required surgical repair; a fractured clavicle; a closed head injury, with loss of consciousness and some residual amnesia; a nasal fracture; a transverse fracture of the lumbar spine; an injury to the cervical spine; a laceration of the spleen; and right thigh hematoma, bruising and lacerations. The plaintiff required a blood transfusion, hospitalization for three days, inpatient rehabilitation for one week and home health care. She sought more than $350,000.00 in medical expenses.

The defendant denied liability asserting that the plaintiff wife had received compensation for her injuries through other sources and was not entitled to additional compensation under her policy with the defendant. At the conclusion of a four day trial, the jury found for the plaintiff and awarded $450,000.00 in compensatory damages. *Schwartz v. Geico, June 27, 2013.*

Personal Injury

Plaintiff and Defendant Both Recover in Action Arising from Motor Vehicle Collision

The plaintiff, a 55 year old male truck driver, alleged that while he was parked on the shoulder of southbound U.S. 95, north of Las Vegas, Nevada, his semi-tractor trailer truck was struck from behind by the defendant. The plaintiff called an accident reconstructionist who testified the defendant's vehicle moved from its lane of travel to collide with the rear of the plaintiff's truck. In addition, the expert saw no physical evidence at the scene to suggest braking or sudden movement by the defendant.

As a result of the collision, the plaintiff alleged cervical, thoracic and lumbar injuries which required a cervical fusion. He called an orthopedic physician who testified that the plaintiff's injuries were causally related and permanent in nature. In addition, the plaintiff called a vocational economist, who testified regarding the plaintiff's lost wages and permanent disability.

The defendant denied liability arguing that he was forced onto the shoulder by other motorists. He further alleged that the plaintiff negligently parked his truck on the shoulder of the roadway, in a non-emergency situation, in highway traffic. The defendant called a trucking safety expert who opined that the plaintiff's truck created an unacceptable hazard. The defendant counter-claimed for his personal injuries. The defendant alleged that he suffered a closed head injury, with mild residual brain damage, plus significant cervical, thoracic and lumbar soft tissue injuries. A physiatrist opined that the defendant's medical expenses of $1,300,000.00 were reasonable, necessary and causally related.

Prior to trial, the plaintiff demanded $1,200,000.00. The defendant served an Offer of Judgment for $25,000.00 and made a pretrial demand for policy limits of $1 million for his personal injuries. The plaintiff offered $25,000.00. At the conclusion of a 15 day trial the jury awarded the plaintiff $16,500.00 in compensatory damages and awarded the defendant $75,000.00 in compensatory damages on his counterclaim. Each party was found to be 50 percent at fault and thus the plaintiff's award was reduced to $8,250.00 and the defendant's award was reduced to $37,500.00. *Taylor v. Kilroy, May 24, 2013.*

Plaintiff Awarded $365,000.00 for Injuries Sustained in Automobile Accident

The plaintiff, a female student, was a passenger in a vehicle operated by non-party Perez. The plaintiff alleged that the defendant, a retired Nevada resident, failed to yield the right of way from a stop sign and collided with Perez's vehicle. The defendant denied liability and argued that Perez caused the accident. As a result of the accident, the plaintiff allegedly sustained a compression fracture at L-2.

At trial, the plaintiff called her treating physician, a pain management specialist, who testified that the four years of pain management treatment Plaintiff received was reasonable and necessary. He also testified that the three additional years of pain management treatment provided by another pain management specialist was also necessary and reasonable.

The defendant asserted that the plaintiff's complaints resolved within one year after the accident, at a cost of $152,000.00 and any medical expenses after that time were unrelated. The defendant presented videos and photographs from the plaintiff's sister's MySpace page depicting the plaintiff participating in a cheerleading competition and hanging upside down on a stripper pole.

Prior to trial, the plaintiff demanded $1,250,000.00, and the defendant served an Offer of Judgment for $500,000.00. During closing arguments, the plaintiff's counsel argued that the defendant was at fault and asked the jury to award the plaintiff $1 million. Counsel for the defendant argued that non-party Perez was 100 percent at fault and alternatively, suggested $152,000.00 in medical expenses plus $25,000.00 to $75,000.00 for pain and suffering was adequate compensation.

At the conclusion of an eight day trial the jury found for the plaintiff. The plaintiff was awarded $365,000.00 in compensatory damages representing $275,000.00 in medical expenses and $90,000.00 for pain and suffering. *France v. Brakkee, June 21, 2013.*

Landscape Company Prevails in Personal Injury Action

The plaintiff, a 30 year old male grocery store assistant manager, allegedly drove into a pile of landscape rock which was in the middle of the roadway. He claimed that the rocks had been left in the roadway by the defendant Service Master Landscape, who replaced rock for the defendant Lynbrook Master Association, without placing warning cones and or lights.

During the third day of trial, the plaintiff settled with Lynnbrook Master Association. Defendant Service Master Landscape denied liability arguing that it performed work for its co-defendant on the other side of the roadway and did not leave the subject rock pile. The defendant also called a visibility expert who testified that the plaintiff should have seen the rock pile and avoided it.

As a result of the accident, the plaintiff allegedly sustained several fractured cervical vertebrae and would require future treatment. The plaintiff called a pain management specialist who testified that the plaintiff's symptoms, medical treatment and future treatment were causally related to the accident. The defendant called a neurologist

who testified that the plaintiff's cervical fractures healed with no neurological abnormalities. In addition, the defendant called a pain management specialist who opined that the plaintiff's cervical fractures healed within months after the accident and there was no explanation for his ongoing residual pain. At the conclusion of a six day trial, the jury found for defendant Service Master Landscape. *Farrell v. Service Master Landscape and Maintenance, Inc., dba Bilmar Landscape Industries and Lynbrook Master Association, July 2, 2013.*

Plaintiff Recovers on Appeal from an Arbitration Decision

The plaintiff appealed an arbitration decision in favor of the defendant, and the matter proceeded to a one day short trial on comparative fault. The plaintiff, a female Nevada resident, was stopped for a red traffic signal in the right lane of a two lane road. The plaintiff alleged that when the traffic signal turned green, her vehicle stalled and was "bumped" by the motorist behind her. While the plaintiff was subsequently standing near her vehicle, defendant Slayden collided with defendant Black and the impact between the two defendants caused Slayden's vehicle to hit the plaintiff, impacting her legs and her vehicle. As a result of the accident, the plaintiff allegedly sustained injuries to her left leg and knee.

Defendant Black denied liability asserting that defendant Slayden negligently changed lanes from the right lane into Black's path and caused the collision. Defendant Black relied on the report of an accident reconstructionist who determined, based on a gouge mark in the roadway and the final resting place of defendant Black's vehicle, that the accident was most likely caused by Defendant Slayden. Defendant Slayden asserted that she executed a safe lane change and that defendant Black caused the collision. Defendant Slayden relied on the report of an accident reconstructionist who opined that defendant Black's expert had insufficient data to justify his conclusions and defendant Slayden's account of the accident was more plausible.

Prior to trial, the plaintiff demanded $10,000.00 from defendant Black, who offered $1,001.00. The plaintiff also demanded $15,000.00 from defendant Slayden. During closing arguments, the plaintiff's counsel asked the jury to award the plaintiff $20,000.00. Counsel for the defendants each argued that the other was 100 percent at fault. The jury found defendant Slayden 100 percent at fault and awarded the plaintiff $12,089.94 in compensatory damages representing $8,089.94 in medical expenses and $4,000.00 for pain in suffering. *Correll v. Slayden, June 13, 2013.*

Medical Malpractice

Plaintiff Recovers for Alleged Dental Malpractice

In 2007, the plaintiff, an owner of a dude ranch in Arizona, began to investigate treatment options for the malocclusion of her teeth, including the possibility of lingual braces. In September 2007, after several interviews, the plaintiff selected the defendant dentist to perform the treatment. The plaintiff received braces in November 2007 and for the next two years returned to Las Vegas from Arizona on a regular basis for evaluation and adjustment. According to the plaintiff, the "iBraces" she received eventually caused the roots of her teeth to be exposed. The plaintiff claimed that the defendant's negligent treatment caused her to require temporary crowns and caps and ultimately extraction of ten teeth and the placement of nine implants.

The defendant denied falling below the standard of care and alleged that the plaintiff's failure to maintain good oral hygiene played an important role in the outcome of her lingual care braces. In addition, the defendant alleged the plaintiff received over-aggressive treatment from subsequent providers and her teeth could most likely have been moved back into the bone, making the implants unnecessary.

After an eight day trial, the jury found for the plaintiff. The jury awarded $469,338.39 in compensatory damages, including $65,338.39 in past medical expenses and $404,000.00 in past pain and suffering. The plaintiff was determined to be 15 percent at fault and the defendant to be 85 percent at fault; therefore, the plaintiff's award was reduced to $398,937.63. *Rynders v. Spilsbury, June 19, 2013.*

Defendant Prevails in Wrongful Death Action for Alleged Failure to Diagnose Swine Flu

On June 14, 2004, the decedent presented to the defendant physician's office for a general check up and blood pressure monitoring. For the next five years, the defendant saw the decedent for checkups, blood pressure monitoring, laboratory studies, renewal of prescription medication to manage his elevated cholesterol and various other complaints. On May 5, 2009, the decedent was seen by the defendant for a job-related physical examination, to refill his medication, and because he developed a productive cough and fever. The defendant obtained a medical history, performed a physical examination, and diagnosed the plaintiff with bronchitis and prescribed antibiotics and cough syrup. The defendant also administered an injection of Kenalog, a steroid medication.

On May 7, 2009, the plaintiff returned with aggravated symptoms. The defendant prescribed medication and advised the decedent to go to the emergency department at non-party University Medical Center. The decedent was admitted with a diagnosis of pneumonia. At UMC, a Rapid Flu Antigen test for Influenza A and B was performed and the results were negative. On the morning of May 8, 2009, the decedent's respiratory status began to deteriorate. Several attempts were made to intubate, and ultimately an open cricothyrotomy was required to secure his airway. The decedent subsequently experienced arrest, but CPR was performed and the decedent's pulses spontaneously returned. The decedent again arrested that afternoon and died after resuscitation efforts were unsuccessful.

The decedent was survived by his spouse, one adult daughter and one adult son, all of whom brought a wrongful death suit. The plaintiffs alleged that the defendant fell below the standard of care when he failed to diagnose swine flu, failed to order a chest x-ray and failed to timely diagnose the decedent's pneumonia on May 5, 2009. The plaintiffs also alleged the Kenalog should not have been administered because it suppressed the decedent's immune system. The defendant denied falling below the standard of care and asserted that, based on the decedent's presenting symptoms on May 5, 2009, a diagnosis of bronchitis was appropriate. In addition, the defendant contended that his treatment plan, including the Kenalog, was within the standard of care. The jury found for the defendant at the conclusion of a five day trial. *Simon v. Tenaya Family Practice, June 7, 2004.*

Nevada Legal Update
is published quarterly by
Alverson, Taylor, Mortensen & Sanders
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Comments

What is the effectiveness of arbitration versus jury decisions? We recently completed an analysis of the results in Nevada.

In Nevada, non-binding arbitration is required for cases believed to have a value of $50,000.00 or less. Appeal from the arbitration award is in the form of a one-day jury trial, de novo in nature. Where the same case has been submitted to both arbitration and a jury, this gives us the ability to analyze and compare the conclusions of the arbitrator vis-a-vis the jury panel.

We evaluated 163 cases spanning from January 2011 to the present. For those cases, the total arbitration awards were $2,881,090.00, compared to jury verdicts in the same cases of $1,269,005.00. Included in the 163 cases were 48 matters where the arbitrator awards totaled $992,106.00, yet the jury later returned a defense verdict. Below is a chart showing the comparative results of our study. The numbers in parentheses are the results of an earlier study we conducted based on 191 cases spanning the years 2005 through 2010.

	Cases	%	
Jury verdicts more favorable to the plaintiff	17	11	(17)
Jury verdicts essentially the same as the arbitration awards	13	8	(6)
Jury verdicts more favorable to the defendant (where both the arbitrator and jury made awards in favor of the plaintiff)	69	42	(44)
Defense jury verdicts where the arbitrator made an award to the plaintiff	48	29	(24)
Defense jury verdicts by both the arbitrator and jury	16	10	(9)
	163	100	100

In terms of the dollar amounts involved, note the following:

1. Where jury verdicts favored the defendant –
   48 arbitration awards for plaintiff with later defense verdicts $ 992,106.00
   69 arbitration awards for plaintiff with later verdicts which were more favorable for the defendant $1,437,725.00
   Total arbitration awards $2,429,831.00

   Jury verdicts on these cases (75.5% lower) $ 596,354.00
2. Where jury verdicts favored the plaintiff –
   9 arbitration awards favoring plaintiff $ 301,886.00

   Jury verdicts on these cases (59% higher) $ 480,982.00

The comparison of arbitration awards to jury verdicts is only one of several factors to be considered when choosing a forum. Costs, for example, clearly need to be evaluated. Also, we do not know if the same percentages or ratios would hold true in cases believed to have a value in excess of $50,000.00. That information is simply not available to us. However, it is interesting to see that the percentages are fairly consistent between our first analysis in 2010 and the present one. Collectively, they represent 354 cases over nearly nine years.