



# NEVADA Legal Update

Spring 2014

A l v e r s o n T a y l o r M o r t e n s e n & S a n d e r s • Nevada's Law Firm

## HIGHLIGHTS

### Rule 17.130(2) of the Nevada Revised Statutes Does Not Permit Compound Interest on Judgments

The Court determined NRS 17.130(2) only allows simple interest on judgments and the plain meaning of the phrase “adjusted accordingly” only means the interest rate is to be adjusted, not the principal balance.

### Pedestrian Plaintiff Awarded \$232,135.11 Following Automobile Accident

The jury in a personal injury action returned a verdict for the pedestrian Plaintiff on her claim that Defendant’s vehicle failed to stop and struck Plaintiff while Defendant was speeding. Plaintiff alleged she sustained extensive injuries to her knee.

### Gender Harassment Case Results in \$30,000.00 Verdict for Plaintiff

Plaintiff claimed she was repeatedly harassed by a co-worker because of her gender and her employer failed to address the issues. Plaintiff also alleged her wages were decreased by over forty percent and she was fired in retaliation for making her complaints regarding gender harassment.

## NEVADA SUPREME COURT DECISIONS

### CIVIL PROCEDURE

#### Nevada Supreme Court Clarifies the Calculation of Interest, Pursuant to NRS 17.130(2)

A tire allegedly separated from a vehicle while that vehicle was traveling on a highway in Utah. As a result, the vehicle crashed, killing several passengers and severely injuring several others. Plaintiffs obtained a jury verdict awarding damages for personal injuries and sought compound post-judgment interest on the judgment.

The parties disagreed about the meaning of the last sentence in NRS 17.130(2): “The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.” Plaintiffs argued that NRS 17.130(2) authorized compound interest on judgments because the statute says the rate is to be “adjusted accordingly” twice per year and does not specify the rate is “per annum.” The Court noted, however, that when NRS 17.130(2) was read as a whole, “adjusted accordingly” required that the interest rate be adjusted every six months to a rate that is two percent higher than the prime rate at Nevada’s largest bank. The statute does not state that the amount of principal is to be adjusted, or that interest is to accrue on interest that has already been accumulated; therefore, the Court found the phrase “adjusted accordingly” did not

authorize compound interest.

The Court also found that the failure to specify “per annum” in the language of NRS 17.130(2) did not prohibit the application of the statute’s plain meaning which unambiguously authorized simple interest only. The Court concluded that interest is simple unless otherwise stated in contract or statute and NRS 17.130(2) does not provide for compound interest. Interest awarded to the Plaintiffs in this case was therefore simple interest on the judgment. *Torres v. Goodyear Tire & Rubber Co.*, 130 Nev. Adv. Op. 3 (Jan. 30, 2014).

### CONTRACTS/CONSTRUCTION DEFECT

#### An Attorney’s Misconduct Does Not Justify a New Trial and the District Court Must Consider Both the Brunzell and Beattie Factors When Evaluating an Offer of Judgment

Homeowners in the High Noon at Boulder Ranch community hired

## IN THIS ISSUE

<b>NEVADA SUPREME COURT</b>	
Civil Procedure . . . . .	Page 1
Contracts/Construction Defect . . . . .	Page 1
<b>NEVADA JURY VERDICTS</b>	
Contract . . . . .	Page 3
Personal Injury . . . . .	Page 3
Medical Malpractice . . . . .	Page 4
Employment . . . . .	Page 5
COMMENT . . . . .	Page 5

experts to inspect their homes for possible construction defects. The experts found architectural, insulation, waterproofing, and other defects. The homeowners provided notice to the builder, D.R. Horton, detailing these findings. D.R. Horton responded, indicating that it planned to inspect the alleged defects, but no repairs were made. The Plaintiffs proceeded to file a complaint, suing D.R. Horton for negligence and breach of warranty. D.R. Horton agreed to repair the defects after receiving the complaint, and the district court stayed the proceedings while those repairs were being made.

After completing the work, D.R. Horton gave the homeowners a formal statement of repairs. The district court then lifted the stay and the homeowners filed an amended complaint. D.R. Horton filed an answer to the complaint as well as a third-party complaint against several subcontractors. Prior to trial, D.R. Horton served offers of judgment on each of the plaintiffs based on the extent of each property's respective damage. Only one of the forty plaintiffs accepted the offer; the rest proceeded to trial. During closing arguments, counsel for the plaintiffs objected to several of D.R. Horton's statements as attorney misconduct. D.R. Horton's counsel specifically urged the jurors to "send a message" because the case was driven by attorneys, the homeowners were liars, and the trial was a waste of the jury's time. The district court sustained many of these objections but did not admonish counsel or the jury. The jury awarded damages to each individual homeowner, with a total award of \$66,300.00. No individual award exceeded D.R. Horton's offer of judgment.

Following trial, both the homeowners and D.R. Horton filed motions for attorneys' fees and costs. The district

court refused D.R. Horton's request for attorneys' fees, but did award post-offer costs. The court also denied the plaintiffs' motions, finding that it would be impossible to award apportioned fees and costs. The trial court also denied the homeowners' motion for a new trial or, in the alternative, for additur.

On appeal, the Nevada Supreme Court considered three separate issues: whether the district court abused its discretion in (1) denying a motion for a new trial due to claims of attorney misconduct; (2) not granting an award of attorneys' fees under NCRP 68 and NRS 17.115; and/or (3) not considering apportioning attorneys' fees and costs.

The Nevada Supreme Court upheld the trial court's denial of the Plaintiffs' motion for new trial. When a district court sustains an objection to attorney misconduct, but fails to admonish counsel or the jury, the objecting counsel must promptly request that counsel be admonished. In the alternative, in seeking a new trial, the objecting party must demonstrate that the misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect and that an admonition to the jury would likely have affected the verdict in favor of the objecting party.

The homeowners failed to promptly request that counsel be admonished by the judge after the objections were sustained. Plaintiffs therefore needed to demonstrate that the alleged misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect. The Court found that the homeowners failed to meet this burden. During closing arguments, D.R. Horton's counsel told the jury that if they wanted to "send a message to the homeowners that their houses are safe, tell them, I sat for 12 weeks; I listened to everything; your houses are safe." The Court found that this statement did

not urge the jury to reject the evidence or the law and counsel was therefore not encouraging jury nullification. The cumulative effect of D.R. Horton's counsel's alleged misconduct did not satisfy the requirements for a new trial. The homeowners also failed to demonstrate that there were no other reasonable explanations for the verdict besides the alleged attorney misconduct.

The Nevada Supreme Court also found when determining whether to award attorneys' fees and costs related to an offer of judgment, the district court must consider the Brunzell v. Golden Gate Nat'l Bank factors in its Beattie v. Thomas analysis. Specifically, in determining whether the fees sought by the offeror are reasonable and justified in amount, the trial court must consider the qualities of the advocate and the character of the work to be done. Here, the district court failed to apply these factors to D.R. Horton's motion for costs and attorneys' fees. The issue was therefore remanded to the district court with instructions to award D.R. Horton's post-offer costs and reconsider the request for attorneys' fees.

The Court held that when a district court awards attorneys' fees and costs against multiple offerees, it must determine how to apportion those awards. The trial court should consider, among other factors, whether different offerees raised distinct issues justifying segregating the costs and attorney

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fees associated with the litigation. Any awards of attorneys' fees and costs in a construction defect action must not be imposed jointly and severally against the homeowners. The Court reasoned that homeowners already face uncertainty in bringing individual construction defect actions and the availability of a joint lawsuit for construction defect cases must be preserved. The Court also found that apportionment is logical and feasible because each home has distinctive defects. On remand, the district court was instructed to apportion an award of attorneys' fees and costs issued against the homeowners based on their individual offers of judgment. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9 (Feb. 27, 2014)

## NEVADA JURY VERDICTS

### CONTRACTS

#### **Defendant Mortgage Company Prevails in Breach of Contract Action**

On August 19, 2009, the Defendant loaned Plaintiff \$270,000.00 to purchase property. A provision in the Deed of Trust required Plaintiff to make monthly payments to Defendant, including amounts for escrow items such as property taxes and insurance premiums. The amounts for escrow items were included until Defendant agreed to cancel these requirements. Plaintiff requested that the Defendant cancel the escrow account to allow him to pay the taxes and insurance directly, but Defendant declined based on the loan to value ratio of Plaintiff's property. Plaintiff continued to pay the loan amount each month, but prepaid one year of property taxes and

insurance premiums directly to third parties and provided notification to the Defendant. In response, Defendant rejected Plaintiff's payments for the loan amount and reported to the credit bureaus that Plaintiff was three months delinquent. On December 7, 2010, Defendant initiated foreclosure proceedings and publicly recorded the Notice of Breach and Default.

Plaintiff filed an action against Defendant alleging breach of contract and breach of the covenant of good faith and fair dealing. Plaintiff also claimed that the mortgage company advised him that the escrow account would be terminated at Plaintiff's request if there was a six monthly payment history, no delinquencies, the property was owner-occupied, and the escrow account was positive. Based on the negative credit reporting and the recording of the foreclosure documents, Plaintiff also alleged Defendant was guilty of defamation.

The trial court granted Defendant's motion for a directed verdict on the issue of breach of the covenant of good faith and fair dealing. Plaintiff sought both compensatory and punitive damages. After a five day trial, the jury found for Defendant. *Hagendorf v. Metlife Home Loans*, September 13, 2013.

### PERSONAL INJURY

#### **Jury Returns Defense Verdict in Premises Liability Action**

Plaintiff, a 20 year old male, in the course and scope of his occupational duties as a television/technology installer, was walking through Defendants' attic when the structure "gave way." Plaintiff fell and allegedly sustained a femur fracture with residual pain. Plaintiff alleged Defendants Auto Tech and the property owner, Kaufman Boulder Market Place, failed to maintain the premises in a safe

and reasonable manner and knew or should have known of the dangerous condition.

At trial, Plaintiff called a safety engineer who opined that the attic violated OSHA standards because it did not have a handrail or proper lighting. Defendants denied liability, asserting that the attic was properly designed and built, and called an architect and structural engineer to testify to the attic's safety. Defendants also argued that OSHA did not apply as Plaintiff was a vendor, not an employee of Auto Tech. Plaintiff sought compensatory damages, including \$85,000.00 in medical expenses. After a six day trial, the jury returned a verdict for Defendants. *Iannone v. MK Automotive, et al.*, August 27, 2013.

#### **Plaintiff Awarded More than \$200,000.00 for Vehicle Versus Pedestrian Accident**

Plaintiff, a 24 year old, unemployed female, was crossing Nellis Boulevard in the crosswalk and was struck by Defendant's vehicle. Plaintiff alleged that Defendant was speeding and traveling 45 miles per hour at the time of impact, and that she was thrown 52 feet. Defendant denied liability, claiming that she did not see Plaintiff and argued Plaintiff was comparatively at fault.

As a result of the incident, Plaintiff allegedly sustained a laceration to the knee, which required 15 staples, and extensive lacerations and road rash over her head and body. Two days later, her knee wound developed an infection which required a two day hospitalization. She also required physical therapy to reduce swelling and to strengthen the leg in preparation for surgical repair and reconstruction of the ligaments. Four months after the accident, a blood clot developed in Plaintiff's leg, travelled to her lung, and required hospitalization and

intravenous blood thinners, which caused Plaintiff to have to postpone her knee surgery for seven months. Additionally, Plaintiff alleged that since her knee surgery, she continues to suffer from residual pain, instability of the knee, and scarring.

At trial, Plaintiff called an orthopedic physician who testified that Plaintiff will ultimately require a total knee replacement. Defendant also called an orthopedist who testified the Plaintiff had a fairly uncomplicated ligament tear, for which the surgery and only one-half of the physical therapy treatment were indicated. Defendant's expert also testified that Plaintiff's medical expenses were excessive.

Plaintiff sought compensatory damages including \$148,978.44 in past medical expenses, and \$80,000.00 to \$100,000.00 in future medical expenses. After a three day trial, the jury awarded Plaintiff \$290,168.89 in compensatory damages, representing \$130,168.89 in past medical expenses, \$60,000.00 for past pain and suffering, and \$100,000.00 for future pain and suffering. Plaintiff was found to be 20 percent at fault and her award was therefore reduced to \$232,135.11. *Garcia v. King*, September 11, 2013.

#### **Defense Verdict Rendered in Slip and Fall Action Brought by Mother and Daughter**

On January 10, 2011, Plaintiffs, mother and daughter, were invited to visit Defendants' residence. Plaintiffs alleged that as they exited Defendants' property, Plaintiff mother slipped on black ice, falling on her back and striking her head on the concrete. Upon seeing her mother fall, the daughter went to assist her mother but also slipped on the ice, landing on her back and striking the back of her head against the concrete. Plaintiffs alleged that the accumulation of ice on the driveway was the result of Defendants'

failure to adjust the sprinkler system to account for the freezing temperature in the morning.

Plaintiff mother alleged she sustained an injury to her right knee, which required surgical intervention and physical therapy, and would require future medical treatment. Plaintiff daughter alleged she sustained a closed head injury with concussion, traumatic brain damages, intracranial bleed, scalp hematoma, swelling of the brain, and residual post-concussion syndrome. Symptoms resulting from her post-concussion syndrome allegedly included headaches, insomnia, decreased libido, increased depression, and constant fear of falling.

Defendants denied liability, arguing that the condition was open and obvious and Plaintiffs assumed the risk. Defendants also asserted that they acted reasonably and Plaintiffs were comparatively at fault for their failure to be aware of their surroundings. Plaintiff mother sought \$74,399.69 in stipulated medical expenses, plus pain and suffering. Plaintiff daughter requested \$32,924.02 in medical damages. After a four day trial, the jury returned a verdict for Defendants. *Poidomani v. Kinsley*, October 17, 2013.

### **MEDICAL MALPRACTICE**

#### **Dental Malpractice Action Results in Verdict for Endodontist**

Defendant Endodontist allegedly fell below the standard of care when he left excess fill material in the area near one of the Plaintiff's teeth, which caused the foreign material to come into contact with the nerve and the nerve canal. Plaintiff, a 64 year old female, relied on the testimony of an oral and maxillofacial surgeon who opined that Defendant fell below the standard of care when he left foreign material outside of the tooth root. This

allegedly compressed the nerve and resulted in permanent nerve damage. As a result of Defendant's negligence, Plaintiff allegedly sustained an injury to the inferior alveolar nerve, resulting in permanent pain and numbness of the left lower lip.

Defendant denied falling below the standard of care. He argued his treatment was indicated and performed correctly and the fill material was not near the Plaintiff's nerves. Defendant called an endodontist and an oral and maxillofacial surgeon to support his position. Defendant's experts testified the foreign material was not in the area of Plaintiff's nerve and that Plaintiff had preexistent neuropathy.

Plaintiff requested compensatory damages, including \$17,000.00 in medical expenses. After a nine day trial, the jury found for Defendant. *Weinberg v. Haymore*, September 13, 2013.

#### **Urologist Prevails in a Medical Malpractice, Wrongful Death Action**

On July 7, 2009, the decedent, a 76 year old Nevada visitor, underwent a robotically-assisted laparoscopic radical prostatectomy performed by Defendant urologist. During the procedure, a section of the decedent's bowel was allegedly perforated, resulting in numerous severe complications. The decedent's condition allegedly deteriorated and he developed an infection, and eventually suffered respiratory failure, renal insufficiency, and sepsis, which resulted in his death on February 26, 2010. The decedent was survived by his wife and two sons. Defendant denied falling below the standard of care.

The Plaintiffs sought both compensatory and punitive damages. After a six day trial, the jury returned a verdict for the Defendant. *Gilbert v. Las Vegas Urology, L.L.P.*, September 16, 2013.

### Plaintiff Recovers Against Hospital but Doctor Prevails in Medical Malpractice Action

Plaintiff, a 26 year old female, was anesthetized for an exploratory laparoscopy, laparoscopic appendectomy, and ovarian cystectomy. Additional tilt of the table was requested during the surgery and the Plaintiff fell to the floor. Plaintiff alleged Defendant general surgeon failed to anticipate that additional tilt would be required and failed to take appropriate measures to secure Plaintiff. Plaintiff also alleged Defendants intentionally and maliciously failed to inform her as to what had occurred in the operating room, resulting in emotional trauma.

As a result of the fall, Plaintiff allegedly sustained injury, including a herniated lumbosacral disk at L5-S1, which required a discectomy and fusion, which ultimately failed. Plaintiff also sustained bruising on her back and arm. Plaintiff claimed that she would require pain management for life, including possible implantation of a spinal stimulator. Plaintiff, who was previously employed as a medical insurance biller or coder, claimed that she was unable to maintain employment.

Defendants denied falling below the standard of care and maintained that Plaintiff was appropriately secured. Defendants asserted that Plaintiff only slid slightly when the tilt was increased and sliding on an operating table can and does occur in the absence of negligence. Defendant general surgeon argued that the safest course of action was to gently lower and place Plaintiff on the floor, straighten the table, reposition her on the table, and then continue with the procedure. Defendants also disputed Plaintiff's damages, arguing there was no mechanism by which the alleged injury to the spine could have occurred during the lowering of Plaintiff from the table to the floor, then back to the table. Rather, Defendants maintained

that Plaintiff's herniated disk was a pre-existing condition. Defendants also asserted that Plaintiff was advised that she fell during the course of the surgery.

Plaintiff sought both compensatory and punitive damages, including \$683,288.40 in past medical expenses, \$4,736,177.00 in future medical expenses, \$84,495.00 in past lost wages, \$976,823.00 in future lost wages, and \$20,692.00 in past lost household services. After a 14 day trial, the jury found for Defendant general surgeon, but awarded \$1,361,288.40 in compensatory damages against the hospital. *Cantrell v. Petersen and Summerlin Hospital Medical Center*, November 8, 2013.

### EMPLOYMENT

#### Plaintiff Awarded \$30,000.00 for Alleged Sexual Harassment

Plaintiff, a 50 year old female, alleged that she was repeatedly harassed by a co-worker because of her gender. Plaintiff allegedly reported the harassment to her employer, but the employer failed to address the issues and her wages were decreased by over 40 percent. She claimed that she was eventually fired in retaliation for asserting complaints regarding gender harassment.

During trial, Plaintiff admitted a videotaped deposition of her family practitioner who opined that Plaintiff's emotional distress, anxiety, and elevated blood pressure were causally related to the harassment from her co-worker and Defendants' failure to address the situation. Defendants argued that Plaintiff was overly sensitive, had pre-existing psychological problems, and her complaints were a figment of her imagination. Defendants also maintained that Plaintiff failed to appropriately explain the alleged sexual harassment, and that she was terminated due to a lack of business revenue and financial difficulties, not

because she reported the harassment. After a four day trial, Plaintiff was awarded \$30,000.00 in compensatory damages. *Degree v. Mytoolstore.com*, September 9, 2013.

### COMMENT

On August 15, 2013, the Committee on Rules of Practice and Procedure ("Standing Committee") set forth proposed amendments to Rule 26 of the Federal Rules of Civil Procedure. Among the changes proposed, the Standing Committee limited the scope of discovery as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.*

Proposed Amendments to FRCP 26(b)(1). The proportional needs of the case were previously considered under FRCP 26(b)(2)(C)(iii). The Standing Committee explained that, "[a]lthough the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the changes incorporate them into the scope of discovery." See Standing Committee Note regarding Propose Amendments to FRCP 26 (emphasis added).

In amending FRCP 26(b)(1), the Standing Committee eliminated the language regarding discovery of "inadmissible information that appears



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reasonably calculated to lead to the discovery of admissible evidence.” The Standing Committee noted, however, that “[d]iscovery of nonprivileged information remains available so long as it is otherwise within the scope of discovery.” *Id.* Thus, discovery of inadmissible evidence is limited to “that which is relevant to a party’s claim or defense and proportional to the needs of the case,” and “should not extend beyond the permissible scope of discovery simply because it is ‘reasonably calculated’ to lead to the discovery of admissible evidence.” *Id.* (emphasis added).

Additionally, the Standing Committee proposed amending FRCP 26(d)(1)(B) to allow a party to deliver Rule 34 requests for production to another party more than 21 days after the party has been served, even though a FRCP 26(f) discovery conference has

not yet been held. Delivery, however, does not count as service; the requests are considered served at the first FRCP 26(f) conference. As the time to respond runs from the date of service, this amendment relaxes the discovery moratorium and “is designed to facilitate focused discussion during the Rule 26(f) conference.” *Id.*

The rules amendment process is overseen by the Judicial Conference, the principal policy-making body of the U.S. Courts. The Standing Committee and its five advisory rules committees evaluate amendment of the federal rules. The period for public comment closed on February 18, 2014. The advisory committee on civil rules will prepare a summary of the comments and re-evaluate the proposed changes. If the advisory committee chooses to substantially change the proposed rule, a second period for

public comment may be offered. Otherwise, the advisory committee will submit a finalized proposal to the Standing Committee for approval. The Standing Committee may discard, revise or accept the amendments. If the amendments are accepted, they will be submitted to the Judicial Conference with a recommendation for approval. If the Judicial Conference approves the proposed amendments, they will be submitted to the Supreme Court. The Supreme Court has until May 1 of the year in which the amendments take effect to submit them to Congress. Once Congress receives the proposal, it has seven months to approve or reject the new rules. If it does not take any action, the rules take effect as a matter of law on December 1 of that year. As such, the proposed amendments could be enacted as early as December 2015.