



NEVADA Legal Update

Summer 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 • N e v a d a ' s L a w F i r m

HIGHLIGHTS

Statements to the Media during Judicial Proceedings are Not Protected under the Absolute Privilege Doctrine

The Nevada Supreme Court reversed the district court's ruling that a defamation claim by Plaintiff should be dismissed. The Court adopted the position of a majority of jurisdictions across the country and held that a statement made to the Wall Street Journal during a judicial proceeding was not protected by absolute privilege.

Medical Malpractice Results in \$659,917.00 Verdict for Plaintiff

Plaintiff claimed that Defendant dentist fell below the standard of care when he failed to diagnose a small lesion on Plaintiff's tongue. Plaintiff claimed that although Defendant felt the lesion, he failed to examine the lesion or refer Plaintiff to an outside physician.

Plaintiff Awarded Nearly \$130,000.00 for Alleged Fraudulent Transfer and Civil Conspiracy

Plaintiff asserted a claim against Defendant and the chiropractic offices where he worked, alleging that Defendants conspired to hide Defendant's earnings and fraudulently transfer his assets. These actions were allegedly undertaken by Defendant to avoid paying a nearly \$2.5 million verdict awarded to Plaintiff in a prior wrongful death, personal injury action.

NEVADA SUPREME COURT DECISIONS

CIVIL PROCEDURE/ WRONGFUL DEATH

The Nevada Supreme Court Clarifies Preclusion of Actions Brought under Different Sub-Sections of Nevada's Wrongful Death Statute

Plaintiff, on behalf of her daughter, filed a wrongful death action pursuant to NRS 41.085 alleging that her daughter's father was fatally assaulted in a Wal-Mart parking lot. Wal-Mart moved to dismiss the action on preclusion grounds, asserting that three of the decedent's heirs previously filed a wrongful death lawsuit against Wal-Mart and lost. The district court granted Wal-Mart's motion to dismiss Plaintiff's claim.

The parties disagreed as to the meaning of NRS 41.085. The statutory scheme creates two separate wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent, neither of which are able to pursue the other's separate claim. Plaintiff contended that, because NRS 41.085 provided for separate claims, the district court erroneously applied claim preclusion to this case.

Claim preclusion applies if (1) the same parties or their privies

are involved in both cases, (2) a valid final judgment has been entered, and (3) "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." Essentially, claim preclusion bars parties from litigating claims that were already asserted in a prior action concerning the same controversy. This doctrine is designed to preserve limited judicial resources and to prevent undue time and expense to the parties.

The Nevada Supreme Court agreed with Plaintiff's contention that NRS 41.085 did not preclude the daughter of the deceased from bringing a claim against Wal-Mart. The Court held that since NRS 41.085 clearly created two wrongful death claims, one belonging to the decedent's heirs and the other belonging to the decedent's personal representative, the Plaintiff's claim was not precluded under NRS 41.085. The

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Court held that the two claims are separate and therefore fail to meet the requirement that the claims in the second case be the same as those that were asserted in first case.

However, the Court did not end its analysis there, as Wal-Mart alternatively asserted that issue preclusion applied to this action. Wal-Mart contended that issue preclusion “provides an independent basis for affirming the dismissal” and would conserve judicial resources, maintain consistency, and avoid harassment of the adverse party. In order for issue preclusion to apply four elements must be met: (1) the issue decided in the prior litigation must be identical to the issue presented in the current; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been the party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

The Court determined that the claim by Plaintiff and the claim previously asserted by decedent’s heirs constituted the same issue. Plaintiff contended that there were significant differences between the legal theories asserted in the two actions, including Plaintiff’s assertion that Wal-Mart had a non-delegable duty to provide safe premises. Despite Plaintiff’s attempt to plead non-delegable duty as a separate cause of action, the Court held that it was “not an independent cause of action, but instead one way to establish the duty requirement for proving negligence.” The Court noted that “issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that

involves the same ultimate issue previously decided in the prior case.” The Court concluded that issue preclusion applied because the negligence action against Wal-Mart remained the same and was based on the same facts.

The Court ruled in Wal-Mart’s favor on the second factor as well, concluding Plaintiff was in privity with the decedent’s estate. The Court held that “while Plaintiff was not a party to the prior action, the estate was representing Plaintiff’s beneficiary interests in the wrongful death recovery.” The Court reasoned that although a beneficiary can assert an independent cause of action, the issue of liability is interrelated because both claims are based on the same wrong. Finally, the Court concluded that the issue was “actually and necessarily litigated” as the prior trial court resolved the issue of whether Wal-Mart was negligent. Because the four elements of issue preclusion were met, Plaintiff’s claim was properly dismissed by the district court. *Alcantara v. Wal-Mart Stores, Inc.*, April 3, 2014

CIVIL PROCEDURE/ DEFAMATION

A Statement to the Media Regarding Ongoing Litigation is Not Absolutely Privileged

Plaintiff filed a complaint against Defendants for wrongful termination, alleging that Defendants demanded that Plaintiff engage in illegal activities. Plaintiff refused to participate, and was threatened and subsequently terminated. Defendant filed a motion to dismiss the complaint, which resulted in a hearing

that garnered widespread media attention. After the hearing, the Wall Street Journal published an online article about the case. According to the article, Defendant stated that Plaintiff “has attempted to explain his termination by using outright lies and fabrications, which seem to have their origins in delusion.” As a result of the online article, Plaintiff amended his complaint to add a claim for defamation. The district court dismissed the defamation claim, holding that Defendant’s statements to the media were made in the context of a judicial action.

The issue in this case, a matter of first impression for the Nevada Supreme Court, was whether statements made to the media regarding ongoing or contemplated litigation were covered by absolute privilege. Nevada has long recognized the existence of an absolute privilege for defamatory statements made during the course of judicial proceedings. In order for the privilege to apply, two elements must be met: (1) the statements must be made in a judicial proceeding and must be contemplated in good faith under serious consideration, and (2) the communication must be related to the litigation.

The Nevada Supreme Court held that the district court “improperly applied the absolute privilege because the statements were made outside of the judicial proceedings to disinterested persons, including the media and the press,” and were thus unrelated to the litigation. The Court examined decisions by other jurisdictions and found that the majority have held that the privilege does not apply to communication made to the media. The Court therefore adopted

the majority view and held that statements made to the media were not protected under the absolute privilege rule. The Court further concluded that the Wall Street Journal was a non-party without a relevant or direct interest in the outcome of the litigation and thus a spectator. The order of dismissal was reversed and remanded to the district court for further proceedings. *Jacobs v. Adelson*, May 30, 2014

NEVADA JURY VERDICTS

FRAUDULENT TRANSFER

Plaintiff Prevails Against Defendant Alleging Fraudulent Transfer to Avoid Paying Damages Award

On March 11, 2005, Defendant Shaw pushed Plaintiff's husband into a metal cage in the waiting area at Fabulous Freddy's Car Wash. As a result, Plaintiff's husband sustained multiple skull fractures and a severe subdural hematoma. He passed away two days later as a result of "blunt head trauma due to assault." Plaintiff filed a complaint against Defendant Shaw and a jury subsequently awarded \$2,484,770.00 in compensatory damages, as well as punitive damages to be assessed later. On March 21, 2009, while engaging in additional discovery to determine the amount of punitive damages, Defendant Shaw filed bankruptcy, resulting in a stay of the state court action. Plaintiff filed an adversary complaint in the bankruptcy proceeding objecting to Defendant Shaw's attempt to discharge the

debt. The Bankruptcy Court entered summary judgment for Plaintiff, finding that Defendant Shaw's conduct was willful and malicious and he was not entitled to a discharge of the jury verdict. Defendant appealed and on March 25, 2011, a stipulated judgment was entered which set the punitive damages against Defendant at \$1,000.00.

In July 2011, Plaintiff served a Writ of Garnishment seeking to collect on the wrongful death judgment. At approximately the same time, Defendant Rainbow Injury Rehabilitation reduced Defendant Shaw's salary from approximately \$102,000.00 per year to \$30,000.00 annually. Defendant Shaw maintained that the reduction in salary was the result of his refusal to perform certain essential job functions. Plaintiff alleged that Defendant Shaw's reduction in salary, coupled with the subsequent formation of non-party Chiropractic Marketing Endeavors which employed Plaintiff Shaw's wife as manager, constituted an unlawful transfer, and that the Defendants had engaged in civil conspiracy.

After a three day trial, the jury awarded \$16,975.91 in compensatory damages against Defendants. The jury also awarded a total of \$114,000.00 in punitive damages. *Weiss v. Rainbow Injury Rehabilitation, L.L.C.*, October 8, 2013

MEDICAL MALPRACTICE

Jury Returns Verdict for Plaintiff for Alleged Failure to Diagnose Cancer

Plaintiff, a 55 year old male, alleged that Defendant dentist fell

below the standard of care when he failed to diagnose a small lesion on Plaintiff's tongue. As a result of this failure, Plaintiff alleged there was a delay in treating his cancer. Plaintiff claimed that although Defendant felt the lesion, he failed to examine, diagnose, or make an appropriate referral to a specialist. As a result of Defendant's negligence, Plaintiff asserted that he had to have six teeth removed and would require restorative dental work.

At trial, Plaintiff called several expert witnesses who testified regarding the standard of care, the delay in the cancer diagnosis and Plaintiff's economic damages. Defendant denied falling below the standard of care, and relied on the testimony of two expert dentists.

Prior to trial, Plaintiff made a settlement demand of \$400,000.00; Defendant offered \$250,000.00. After a nine day trial and six hours of deliberation, the jury awarded \$659,917.00 in compensatory damages, which included \$3,000.00 in past medical expenses, \$22,917.00 in future medical expenses, \$121,000.00 for past economic loss, \$263,000.00 for future economic loss, and \$250,000.00 for pain and suffering. *Herrington v. Gilbreth, D.M.D.*, November 1, 2013

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PERSONAL INJURY

Plaintiff Awarded \$50,000.00 for Motor Vehicle Accident at Stop Sign

Plaintiff, a 45 year old, male cashier, alleged that Defendant negligently ran a stop sign and caused a collision. Defendant, a 24 year old, female beautician, denied liability. She maintained that she stopped at the stop sign, but her view was obscured by another vehicle, which was traveling in the same direction as Plaintiff.

At trial, Plaintiff called an accident reconstructionist who testified that Plaintiff was traveling below the posted speed limit when Defendant ran the stop sign. Plaintiff also relied on the testimony of his treating physician, who testified that Plaintiff did not have lumbar pain prior to the collision. Plaintiff also called other expert witnesses to discuss the cost of a cervical fusion, the significant increase in narcotic medication Plaintiff was required to take, and Plaintiff's inability to work. Plaintiff's economist testified that his past and future damages were approximately \$1 million.

Defendant relied on the testimony of a pain management specialist, who opined that Plaintiff had returned to his baseline condition and the pain he was experiencing was from his preexisting degenerative disk disease. An expert neurosurgeon testified that Plaintiff misrepresented his preexistent lumbar pain during his examination. Defendant's expert physiatrist also testified that Plaintiff made complaints about chronic cervical and lumbar pain for 25 consecutive months prior to the instant accident.

Plaintiff served a \$250,000.00 pretrial offer of judgment and

Defendant countered with a \$75,000.00 offer. At trial, Plaintiff sought \$115,000.00 for past medical expenses; \$350,000.00 for future medical expenses; \$80,000.00 in past lost wages; \$961,062.00 for future lost wages; and \$5,000.00 in property damage. During closing arguments, Plaintiff's counsel asked the jury to award \$2,400,000.00 in damages. Defense counsel suggested an award of \$14,000.00 to \$15,000.00 would be appropriate. After a seven day trial and one hour of deliberations, the jury returned a verdict and awarded Plaintiff \$50,000.00 in compensatory damages. *Kirt v. Smith*, November 26, 2013

Plaintiff Verdict Rendered in Trip and Fall Action Brought by Retired Nevada Resident

Plaintiff, a 66 year old retired male, alleged that Defendant's employee placed a pallet in an aisle of a local Costco store, with the corner covered by a box. As Plaintiff was attempting to avoid the pallet, he tripped and fell over the corner. Plaintiff filed a Complaint against Defendant, alleging a hazardous condition. Defendant denied liability and argued the pallet was open and obvious, and Plaintiff should have avoided it.

As a result of the fall, Plaintiff allegedly sustained a meniscus tear in his knee, which required two surgeries to repair. Plaintiff also claimed that he tore his rotator cuff, as well as a torn tendon in the right hand, both of which required surgery. Plaintiff served a \$10,000.00 pretrial offer of judgment, and Defendant countered with a \$5,000.00 offer. During closing arguments, Plaintiff's counsel argued that

Defendant was 100 percent at fault and asked the jury to award \$400,000.00 in damages. After a two day trial and two plus hours of deliberations, the jury awarded \$200,000.00 in compensatory damages. The jury also determined, however, that Plaintiff was 50 percent at fault, thereby reducing his award to \$100,000.00. *Foster v. Costco Wholesale Corporation*, January 29, 2014

False Imprisonment Action Results in Verdict for Defendant

Plaintiff, a 48 year old disabled African-American, was eating at Defendant's breakfast buffet. Plaintiff paid the cashier for the buffet and was escorted to his assigned table by the hostess. Plaintiff then returned to Defendant's poker area for a short period. After returning from the poker area, Plaintiff could not locate his assigned table and sat at another table. Defendant's manager asked Plaintiff to provide his receipt, which Plaintiff was unable to do. The manger then summoned hotel security and Plaintiff was detained. Once Defendant located Plaintiff's receipt, Plaintiff was permitted to return to his table and finish his breakfast.

Plaintiff filed a claim for false imprisonment and alleged that Defendant was motivated by a bias against disabled African-Americans and wanted Plaintiff to pay for his meal twice. Plaintiff also claimed that hotel security made a show of force and intent to use force for the purpose of taking Plaintiff into custody. Plaintiff was allegedly told to stand, but maintained that he was unable to do so because he was entrapped and imprisoned by Defendant's hotel security.

Defendant denied liability and asserted that its employees acted reasonably and followed procedure, and that Plaintiff became confrontational. Defendant's hotel manager testified that the procedure was to notify security when a patron became confrontational. Defendant further argued that Plaintiff was not confined, restrained, or deprived of his freedom at any time during the incident. Finally, Defendant asserted that race played no role and Plaintiff's notion that he was victimized on the basis of race was the product of his imagination.

Plaintiff sought \$10,000.00 in compensatory damages and \$10,000.00 in punitive damages. After a one day trial the jury returned a verdict for the Defendant. *Edwards v. Rio Properties, L.L.C.*, January 31, 2014

COMMENTS

During the course of litigation, parties may request deposition testimony on behalf of a corporation. A determination must then be made as to who will represent the corporation and offer testimony that will bind the organization. Rule 30(b)(6) of the Nevada Rules of Civil Procedure provides:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation...and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth,

for each person designated, the matters on which the person will testify...The persons so designated shall testify as to matters known or reasonably available to the organization.

Nevada case precedent has not articulated the distinctions between a person most knowledgeable or PMK deposition and a Rule 30(b)(6) deposition; however, the United States District Court noted that "federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt. Ltd. v. Ticolor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2000).

Pursuant to FRCP 30(b)(6), the deposing party must specifically invoke the rule within the notice of deposition and identify the topics to be covered with "reasonable particularity." The responding party must then designate a person to testify on "matters known or reasonably available" to the corporation. The U.S. District Court for the District of Minnesota noted that "the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000); see also *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D. D.C. 1998) (rejecting notice to depose on "any matters relevant to this case" as not meeting the "reasonable particularity" requirement). In *Paparelli v. Prudential Ins. Co of Am.*, 108 F.R.D. 727, 728 (D. Mass. 1985), the court acknowledged that, because the rule requires

the notice to describe matters with "reasonable particularity," it is implied that the deposition is subject to the same limitations. Permitting questions beyond the scope of the notice would essentially make the "reasonable particularity" requirement useless. The court concluded, however, that it was improper to instruct a witness not to answer a question that exceeded the scope of the notice. Rather, the party should suspend the deposition and seek a protective order.

Corporations have a duty to "make a conscientious, good faith effort to designate knowledgeable persons for 30(b)(6) depositions and prepare them to fully and unequivocally answer questions about the designated subject matter." *Great American Ins. Co. of New York v. Vegas Construction Co., Inc.*, 251 F.R.D. 534, 538 (D. Nev. 2008). The personal knowledge of the designated representative is of no consequence and the corporation cannot simply claim that there is no witness with personal knowledge regarding the areas of inquiry. If needed, the corporation "must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits." *Id.*

A recent Nevada Supreme Court decision, and the local discovery commissioners' application of the holding, seemingly impacts the documents and information used to prepare a representative for a Rule 30(b)(6) deposition. In the underlying employment action, an evidentiary hearing was conducted regarding defendant Las Vegas Sands' alleged conduct during the discovery process. *Las Vegas Sands Corp. v. Eighth Judicial Dist. Ct.*, 319 P.3d 618 (Nev. 2014).



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During that hearing, defendant's representative admitted that he had reviewed emails and records prior to testifying in order to refresh his recollection as to certain dates. The plaintiff asserted that the emails and records the representative reviewed were discoverable pursuant to NRS 50.125, which requires a party to disclose any documents used to refresh a witness' recollection. The district court issued an order compelling defendant to produce the documents. A Petition for Writ was then filed with the Nevada Supreme Court.

The Nevada Supreme Court noted that there was a difference between NRS 50.125 and Rule 612 of the Federal Rules of Evidence. FRE 612 allows the district court to exercise its discretion to preclude disclosure of privileged documents used to refresh a witness'

recollection before testifying. NRS 50.125 does not include such discretionary language. Nevada district courts must therefore treat privileged and non-privileged documents the same if they are relied on when refreshing a witness' recollection. The Court reasoned that if not discoverable, it "would encourage witnesses to use privileged writings to refresh recollection in an attempt to shield the witness from any meaningful cross-examination." Because defendant's representative relied on the privileged documents to refresh his recollection, defendant should have been required to disclose the documents to the plaintiff. The Court noted, however, that a request for documents pursuant to NRS 50.125 must be made and ruled upon by the district court at the time of the hearing. The statute

may not be used as a general rule of discovery.

Based upon this holding in Las Vegas Sands, the discovery commissioners have recently required parties to disclose documents used to prepare a Rule 30(b)(6) representative for deposition. These documents have included reports prepared by counsel during the course of litigation containing information regarding the facts of the case. Consideration must therefore be given to the documents and information used to educate a corporate representative for deposition, as required by Rule 30(b)(6).

