



# NEVADA Legal Update

Summer 2015

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

### A Treating Provider's Personal Medical Records May be Subject to Disclosure

The confidential medical records of a treating physician may be discoverable, and the privilege terminated, if the condition the physician is alleged to have suffered is an element of a claim or defense in the proceeding. The physician's condition must also be a fact "to which the substantive law assigns significance," such that the claim or defense fails unless the condition was established as fact.

### Plaintiff Awarded Less Than Medical Specials After Motor Vehicle Collision

As a result of a motor vehicle collision, Plaintiff allegedly sustained injuries to her shoulder, cervical and lumbar spine. She further claimed that she was unable to return to work due to chronic pain and sought \$55,845.59 in past medical expenses. The jury ultimately returned a verdict substantially less than the medical specials sought by Plaintiff.

### Senate Bill 161 Vetoed by Governor

Nevada Governor, Brian Sandoval recently vetoed a Senate bill that would have limited strict products liability claims to the manufacturer of the product, except under limited, express circumstances. Proponents of the bill had hoped to limit liability for sellers or renters of products who were not involved in the design or manufacture of an allegedly defective product.

## NEVADA SUPREME COURT DECISIONS

### MEDICAL MALPRACTICE

#### The Nevada Supreme Court Addresses the Admissibility of a Medical Provider's Personal Medical Records

Alec Bunting, a minor, experienced heart problems following a tonsillectomy performed by Dr. Ryan Mitchell. Alec's guardian, Stella Ravella, filed an action against Dr. Mitchell and his employer for medical malpractice and negligent hiring and supervision. Plaintiffs alleged that Dr. Mitchell's misadministration of anesthesia during the surgery caused then seven year-old Bunting's heart to fail. Alec Bunting survived, but required the assistance of a pacemaker.

Plaintiffs claimed that Dr. Mitchell was impaired when he performed the tonsillectomy and that his employer should have recognized his addictive behavior and prevented him from treating patients. To support their position, Plaintiffs subpoenaed Dr. Mitchell's counseling and substance abuse treatment records. Dr. Mitchell objected and cited the doctor-patient and family therapist-client privileges.

Three months after Plaintiff's tonsillectomy, Dr. Mitchell was arrested for domestic violence while high on drugs. Three months later, he was again arrested for driving under the influence. Dr. Mitchell was ultimately convicted of both offenses. During his deposition, Dr. Mitchell admitted that at the time

he operated on Plaintiff, he was addicted to Ketamine and Valium, which he had abused intermittently for years. He denied, however, operating on patients while under the influence of drugs or alcohol. He also disclosed during his deposition that after his arrest, he and his wife attended marriage counseling and that he received treatment for substance abuse by two different doctors on outpatient and inpatient basis.

Nevada Revised Statutes §49.225 and §49.247 protect confidential communication between patients and their physicians, and between clients and their marriage and family therapists. While the privileges initially attached to Dr. Mitchell and his treating providers, the issue was whether the privilege was lost or waived when Dr. Mitchell's drug addiction became relevant to Plaintiffs' claims. There was no existing Nevada precedent discussing whether or how privileges were applied, or waived, when a defendant claimed the privilege and the plaintiff placed the defendant's physical or mental condition in issue. Dr. Mitchell therefore sought

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relief from the Nevada Supreme Court to prohibit disclosure of his privileged medical records and communications.

In Nevada, it has been established that a patient who voluntarily puts his physical or mental condition in issue in a lawsuit loses the protection of the doctor-patient privilege for communications with the doctor regarding that condition. Here, Plaintiffs introduced Dr. Mitchell's drug addiction issue. If analyzed purely as a matter of waiver, the doctor-patient privilege remained intact and was not affected by Plaintiffs' claims; however, the Nevada Supreme Court also considered Nevada's statutory patient-litigation exception.

NRS §49.245(3) provides that there is "no privilege under NRS 49.225 as to communications relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense." The Nevada Supreme Court determined that a plain reading of the statute did not require the patient to place his condition in issue for the exception to terminate the privilege. If there was a confidential communication that was relevant to a patient's condition, and that condition was an element of a claim or defense, the exception to the privilege applied. The Nevada Supreme Court refused Dr. Mitchell's request to enlarge the doctor-patient privilege by judicially narrowing one of the statute's principal exceptions. The Court noted, however, that the exception was limited. In order to terminate the privilege, the condition must be more than merely relevant to a litigated claim or defense. The party seeking to overcome the privilege must show that the condition of the patient is "an element of a claim or defense" in the proceeding. The patient's condition must also be a fact "to which the substantive law assigns significance," and the claim or defense will fail unless the condition asserted was established.

The Nevada Supreme Court held that while Plaintiffs' request for Dr. Mitchell's records may have been relevant to their

claim, they failed to establish that Dr. Mitchell's alleged drug addiction was an element of their medical malpractice claim. The legal standard for medical malpractice is *whether* the physician's conduct fell below the standard of care, not *why*. The privileged records were therefore not discoverable as to the medical malpractice claim. The confidential communications between Dr. Mitchell, his wife and their marital and family therapist were also protected from disclosure. The negligent hiring and negligent supervision claims, however, required Plaintiff to establish that Dr. Mitchell's employer knew or should have known Dr. Mitchell was unfit for the position he held, and Dr. Mitchell's medical records may have had relevance to that claim.

The Nevada Supreme Court ultimately held that the district court was permitted to conduct an *in camera* review of the medical records relating to Dr. Mitchell's treatment. The district court could then identify records appropriate for disclosure or place appropriate limitations before discovery of those records was allowed. *Mitchell v. The Eighth Judicial District Court and Alec Bunting by and through his Guardian Ad Litem, Stella Ravella*, 131 Nev. Adv. Op. 21 (April 2015).

## CONTRACT

### **During a Deposition, Counsel Must Make a Prompt and Sufficient Record to Preserve the Attorney-Client Privilege**

Coyote Springs Investment, LLC and BrightSource Energy, Inc. entered into a lease allowing BrightSource to develop a solar energy generating facility on Coyote Spring's property. The parties negotiated the terms of the lease through several documents exchanged via email. The parties then finalized and executed the lease, and Coyote Springs created a lease summary for its bankers and appraisers. Approximately one year later, BrightSource sought to terminate the

lease. In response, Coyote Springs advised BrightSource that the termination was ineffective in the absence of a lease termination fee. A dispute arose regarding the termination terms and Coyote Springs filed an action against BrightSource.

During discovery, BrightSource deposed the former co-owner and manager of Coyote Springs, Mr. Whittemore, who testified that he and Coyote Springs' general counsel negotiated the lease. Mr. Whittemore was asked whether he agreed to the termination provisions in the lease, and responded that he believed the provision "appropriately reflects the definitions" of the lease to which the parties agreed. When asked again about the lease's termination conditions, Mr. Whittemore stated that they were the business terms agreed to by both parties. Mr. Whittemore's deposition was subsequently continued and resumed nearly six months later. During the second deposition, BrightSource's counsel further questioned Mr. Whittemore regarding his approval of the term sheets and the lease summary. Mr. Whittemore testified that he believed that the term sheets were an accurate statement of terms agreed upon before the lease agreement was finalized. When questioned about the lease summary distributed to Coyote Springs' bankers and appraisers, Mr. Whittemore testified that he believed he had reviewed earlier versions of the summary for accuracy and approved the final draft before it was circulated.

After BrightSource's counsel completed this round of questioning, Coyote Springs' litigation counsel requested a break from the deposition. Counsel for BrightSource specifically objected to any discussion during the break regarding questions that Mr. Whittemore had already been asked. When the deposition resumed, Coyote Springs' counsel questioned Mr. Whittemore and clarified that he believed the term sheets were not controlling and that once one of the conditions was met, the company earned a termination fee. Mr. Whittemore also agreed that the

lease summary was inaccurate, but did not recall whether he had noticed the issue previously.

Following Mr. Whittemore's depositions, BrightSource filed a motion *in limine* to exclude any testimony offered by Mr. Whittemore after the conference with his counsel and to "elicit at trial the substance of what was said during the private conference." The district court granted the motion, and explained that counsel was not entitled to preparation as part of a break in a deposition.

The bench trial subsequently commenced and during cross-examination of Mr. Whittemore, counsel for BrightSource inquired as to what was discussed at the deposition conference. Coyote Springs' counsel objected based on attorney-client privilege. Although noting that the conference may have included privileged information, the court overruled the objection, "given the timing of the communication between counsel and the witness," and allowed the questioning to continue. At the close of BrightSource's case in chief, Coyote Springs moved for reconsideration of the Whittemore deposition issue. The court determined that Mr. Whittemore's anticipated testimony was material to the issue of mistake, and stayed the entry of its findings of fact and conclusion of law pending guidance from the Nevada Supreme Court.

The issue before the Nevada Supreme Court was whether the conversation between Mr. Whittemore and Coyote Spring's counsel during the deposition was protected by the attorney-client privilege. The Nevada Supreme Court held that attorneys may confer with a witness during an unrequested recess or break in a discovery deposition. Attorneys may not, however, request a break to confer with a witness during a discovery deposition unless the purpose of the break is to determine whether to assert a privilege. Once the deposition proceedings resume after a private conference is requested to determine whether to assert a privilege, the attorney must make the following record:

1) the fact that a conference took place; 2) the subject of the conference; and 3) the result of the conference, specifically, the outcome of the decision whether or not to assert a privilege. The Nevada Supreme Court stressed that counsel must make a record of the confidential communications promptly after the deposition resumes in order to preserve the attorney-client privilege.

Based upon the trial record, Mr. Whittemore and counsel "broke and went into a private office." Had that action been placed on the deposition record, the first requirement would have been satisfied. The record also reflected that during the deposition conference, Coyote Springs' counsel asked Mr. Whittemore whether he "misunderstood or misinterpreted either questions or documents that had been presented earlier in the examination," and that counsel did not "coach" Mr. Whittemore's testimony or refresh his recollection. Had that discussion been placed on the deposition record, it would have satisfied the second requirement for record sufficiency. The record was not made, however, and accordingly the communications between Mr. Whittemore and Coyote Springs' counsel during the break in Mr. Whittemore's deposition were not privileged. Coyote Springs' counsel

requested the recess but failed to make a sufficient, contemporaneous record of the privileged communications. *Coyote Springs Investment, LLC v. Eighth Judicial District Court and BrightSource Energy, Inc.*, 131 Nev. Adv. Op. 18 (April 2015).

## NEVADA JURY VERDICTS

### PERSONAL INJURY

#### Jury Returns Verdict in Favor of Plaintiff, Far Below Alleged Medical Specials

Plaintiff, employed as a server, was operating a 1999 Dodge Stratus, travelling 35 miles per hour on Sunset Road. Defendant, in his seventies, negligently pulled from the side of the street into Plaintiff's path of travel. Plaintiff alleged that as she swerved to avoid Defendant's vehicle, her wheel well was caught on the step of Defendant's GMC Sierra pickup truck. Her vehicle was then drug by Defendant's vehicle for some distance until it disengaged and crashed to the ground. Plaintiff further alleged that once her vehicle disengaged, she was pushed up in her seat, struck her head on the roof of her vehicle, and then crashed back down into her seat.

As a result of the collision, Plaintiff allegedly sustained injuries to her shoulder, cervical and lumbar spine. Plaintiff also claimed that she had ongoing residual chronic spinal pain and had been unable to work since the accident. Plaintiff sought \$55,845.59 in past medical expenses. After a four day trial, the jury awarded Plaintiff \$7,608.66 for past medical expenses, \$2,565.00 for past lost wages, \$2,500.00 for past pain and suffering, and \$2,500.00 for future pain and suffering, for a total award of \$15,173.66. *Wilson v. Palmer*, October 3, 2014.

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### **Plaintiff's Arbitration Award Reduced after Defendant Disputed Impact Severity**

Defendant, a Nevada resident, filed an appeal of Plaintiff's \$18,182.00 arbitration award. Plaintiff, a 60 year-old homemaker, was rear-ended by a vehicle operated by Defendant. Defendant admitted negligence, but argued that Plaintiff's alleged injuries were not causally related to the motor vehicle accident. Defendant also maintained that the impact was minor.

Plaintiff allegedly incurred approximately \$12,000.00 in medical expenses. Plaintiff made a pretrial demand of \$15,000.00 and Defendant offered \$7,500.00. During closing arguments, Plaintiff's counsel asked the jury to award Plaintiff \$18,182.00. Defense counsel suggested that \$810.00 was adequate compensation. After a one day trial, the jury awarded Plaintiff \$810.00 in compensatory damages. *Del Asin v. Torrescovarrubias*, December 5, 2014.

### **Plaintiff's Award Reduced to \$0 Due to Comparative Negligence**

Plaintiff, a 28 year-old male, was a passenger in a 1997 Dodge Ram 2500 pickup truck, operated by Defendant. Plaintiff alleged that Defendant negligently lost control of the vehicle and struck an embankment, which caused the vehicle to roll. Defendant, a 23 year-old female, denied liability and asserted that Plaintiff "yanked" the steering wheel, causing her to lose control of the vehicle.

Plaintiff alleged soft tissue injuries to his cervical and thoracic and lumbar spine, and sought \$42,000.00 in medical expenses. After a three day trial, the jury awarded Plaintiff \$40,631.91, but found him to be 95 percent and fault, thus he recovered nothing. *Taylor v. Christensen*, January 7, 2015.

### **Jury Verdict for Plaintiff for Injuries Sustained in Collision**

Plaintiff, a 22 year-old student, alleged that Defendant negligently caused a motor vehicle collision. Defendant admitted

negligence, but argued that Plaintiff's alleged injuries were not caused by the accident. Plaintiff allegedly sustained a superior labrum anterior posterior tear of the right shoulder, which required surgical intervention, as well as soft tissue injuries.

At trial, Plaintiff relied on her medical records. Defendant relied upon the testimony of an orthopedic physician, who opined that Plaintiff's shoulder surgery was unrelated. Plaintiff sought \$25,409.00 in medical expenses and \$172.50 in lost wages. Plaintiff served a pretrial Offer of Judgment of \$24,599.00, and Defendant offered \$15,000.00. After a one day trial, the jury awarded Plaintiff \$40,881.50. *Strube v. Chapman*, January 9, 2015.

## **MEDICAL MALPRACTICE**

### **Defense Verdict in Wrongful Death Action**

Decedent, a 72 year-old California resident who was visiting Nevada, was survived by four adult sons, one adult daughter, and his spouse. Decedent presented to the hospital emergency department on December 17, 2009, with symptoms of heart failure, shortness of breath, and swollen extremities. Decedent, who had a surgical stent placed in his heart in March 2009, was admitted to the hospital and placed in the care of Dr. Syde, who consulted with two other cardiologists, Dr. Prasad and Dr. Mirza. On December 20, 2009, Dr. Mirza performed a cardiac catheterization, but later that day, Decedent's blood pressure dropped significantly. Medications and fluids were administered, but Decedent's blood pressure remained extremely low. Dr. Mirza and Dr. Prasad thereafter consulted with Defendant Dr. Afifi, a cardiothoracic and cardiovascular surgeon, who agreed to perform a procedure to relieve the pressure around Decedent's heart. Decedent suffered a cardiac arrest and died approximately ten hours after the catheterization procedure and prior to Dr. Afifi's arrival to the hospital.

Plaintiffs filed suit for wrongful death

and medical malpractice against Dr. Mirza and Dr. Prasad on December 16, 2010. After conducting Dr. Afifi's deposition as a witness on March 6, 2012, Plaintiffs filed an Amended Complaint to include allegations against him as a Defendant. Dr. Afifi asserted, however, that Plaintiffs' claims against him were barred by the statute of limitations. In response, Plaintiffs alleged that Dr. Afifi intentionally concealed his involvement in Decedent's care and that his involvement was not revealed until his deposition. The trial was bifurcated and the issue of statute of limitations was tried first and the issue of liability for wrongful death and medical malpractice was to be tried second. The first trial ended in a mistrial and then proceeded to retrial.

At trial, Plaintiffs alleged that the statute of limitations was "tolled" because Defendant concealed facts from Decedent's medical records. Plaintiffs relied on a cardiologist who testified that he was unable to render an opinion until after Dr. Afifi's deposition. Dr. Afifi maintained that the statute of limitations began to run on December 20, 2009, the day Decedent died, and Plaintiff's Amended Complaint was therefore time-barred by the one-year statute of limitations. Dr. Afifi maintained that he did not conceal any medical facts and that Plaintiffs failed to exercise reasonable diligence within the discovery phase of the original lawsuit when Dr. Afifi's identity was known to Plaintiffs through Decedent's medical records. Defendant relied on the testimony of a cardiothoracic surgeon, who stated that Decedent's medical records contained all material facts.

Plaintiffs made a pretrial demand of \$359,000.00, but Dr. Afifi refused to make an offer. During closing arguments, Plaintiffs' counsel argued that the statute of limitations was "tolled" due to Defendant's intentional concealment. Defense counsel argued there was no evidence of concealment and that the case was barred by the statute of limitations. After a five day trial, the jury returned a verdict for Defendant. *Neal v. Afifi, M.D.*, January 9, 2015.

## PREMISES LIABILITY

### Verdict for Plaintiff for Injuries Sustained in Big Lots' Parking Lot

Plaintiff, in his mid-forties and unemployed, alleged that when he exited Defendant Big Lots, he was approached by two unidentified Hispanic males in plain clothes, who claimed to work for Defendant Monument Security, as part of Big Lots' "loss prevention." Plaintiff continued to walk to his vehicle after the two males failed to respond to Plaintiff's requests to present badges or paperwork which identified them as security or loss prevention. Once he reached the middle of the parking lot, Plaintiff was tackled to the asphalt, without warning, by the two males. Plaintiff alleged that one of the two males placed his knee and/or foot on Plaintiff's back, which resulted in a leg injury and a fractured ankle. Defendants denied liability.

At trial, Plaintiff sought medical expenses of approximately \$47,000.00. After a one day trial, the jury found Plaintiff to be 30 percent at fault and awarded him a total of \$7,000.00. *Wright v. PNS Stores, Inc.*, October 10, 2014.

### Plaintiff Partially Liable for Slip and Fall

Plaintiff, acting in the course and scope of his occupational duties for non-party Reddy Ice Holdings, was delivering ice to Defendant's restaurant premises. Plaintiff alleged that as he exited the rear of Defendants' business, he slipped and fell on the ramp. Plaintiff filed suit against Defendants alleging that they failed to maintain and inspect the ramps to ensure that no dangerous condition existed and that Defendants knew, or should have known of the dangerous condition.

At trial, Plaintiff relied on a safety engineer who testified regarding unsafe conditions. Defendants denied liability and maintained that their maintenance and inspection of the property was appropriate. In the alternative, Defendants argued Plaintiff was comparatively at fault.

Plaintiff sustained a spiral fracture of his distal fibula, which required surgical repair, and claimed that he was unable to perform his occupational duties. An orthopedic physician testified regarding the reasonableness of Plaintiff's treatment and medical expenses. Plaintiff sought \$420,000.00 in medical expenses and made a pretrial demand of \$135,000.00. Defendants served a \$63,501.00 Offer of Judgment. After a four day trial, the jury found Plaintiff to be 49 percent at fault and awarded him a total of \$35,275.88. *Metcalfe v. Glenborough 3900 Paradise Road, L.L.C. and Firefly Partners, L.L.C.*, January 23, 2015.

## BREACH OF CONTRACT

### Jury Verdict for Plaintiffs Following Sale of a Hair Salon

In April 2013, Plaintiffs, a husband and wife, sold their hair salon to Defendant for \$260,000.00 plus creation of a mentoring/consultation agreement. Defendant executed a promissory note payable to Plaintiffs. Plaintiffs subsequently alleged that Defendant breached the consulting/mentoring agreement and employment agreement, and asserted claims for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and wrongful termination of Plaintiff wife. Plaintiffs further alleged that Defendant stopped making monthly payments on the promissory note in August 2013.

Defendant, a resident of Canada, counter-claimed that Plaintiffs breached the covenant of good faith and fair dealing, interfered with business relations, and were guilty of fraud, civil conspiracy, and conversion.

Plaintiffs sought \$205,580.16 in compensatory damages, a 1998 Ferrari 355 Spider F, \$180,000.00 in lost wages, an unspecified amount in punitive damages, and attorney's fees and costs. Defendant sought compensatory damages. Plaintiffs made a pretrial demand of \$150,000.00, but Defendant refused to make an offer.

During closing arguments, Plaintiffs' counsel argued that Defendant breached the contract and was not justified in terminating Plaintiff wife's employment. Defense counsel argued that Defendant's actions were justified. After a seven day trial, the jury found for Plaintiffs on Defendant's counterclaim, awarded Plaintiff wife \$180,000.00 in compensatory damages for wrongful termination and awarded Plaintiffs \$45,000.00 for breach of fiduciary duty along with the Ferrari and the hair salon. *Forrello v. Kucey*, December 24, 2014.

### Verdict for Insurance Agency on Bad Faith Claim

Plaintiffs, operating a 2005 Dodge Neon, were involved in a hit and run motor vehicle accident. The phantom vehicle was never located. Plaintiffs filed a claim with Defendant insurance carrier for uninsured motorist coverage, but Defendant denied the claim. Plaintiffs then filed an action against Defendant for bad faith and breach of the insurance contract. Plaintiffs also alleged that Defendant sales agent knew that Plaintiffs did not understand certain waivers and that the waiver of uninsured coverage was forged.

Defendant denied liability and maintained that Plaintiffs did not have uninsured motorist coverage at the time of the underlying accident. Defendant argued that the waiver was not a forgery and that Plaintiffs had previously complained regarding the cost of insurance and requested that Defendant drop the uninsured motorist coverage. Plaintiffs allegedly sustained cervical, thoracic, and lumbar soft tissue injuries, with residual pain and emotional trauma, and sought approximately \$20,000 in joint medical expenses. Defendant served a \$38,000.00 pretrial Offer of Judgment. After a one day trial, the jury returned a verdict for Defendant. *Segovia v. Midcentury Insurance Company*, January 16, 2015.



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## COMMENTS

### **Senate Bill 161: Protecting the Innocent Seller from Product Liability Claims**

During the 2015 legislative session, the Nevada Legislature passed Senate Bill 161. Bill 161, referred to as the “innocent seller” bill, would have amended Nevada Revised Statutes Chapter 41 to protect innocent sellers from product liability claims. The statute, as amended, would have provided that “no product liability action may be brought or maintained against a seller other than a manufacturer of the product.” The Nevada Legislature sought to protect sellers or renters of products when the actual dispute was related to the product’s design or manufacture. Seventeen other states have enacted similar laws.

The amended statute would have expressly included six exceptions to the general rule. Pursuant to these exceptions, a seller or renter of a product could be liable for strict products liability if: 1) the seller had substantial control over

the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, warnings or instructions of the product and that control was a proximate cause of the harm; 2) the seller altered, modified, or installed the product without the authorization or request of the manufacturer, or did not comply with manufacturer’s instructions, and these actions were a proximate cause of the harm; 3) the seller resold the product after the product’s first use and the product was not in substantially the same condition as when it was in the manufacturer’s possession; 4) the seller failed to exercise reasonable and product appropriate care in assembling, maintaining, storing, transporting, or repairing, the product or when conveying the manufacturer’s labels, warnings, or instructions to the product’s user or consumer and that was a proximate cause for the harm; 5) the seller had actual knowledge of the defect; and 6) the seller made an express warranty that differed from the manufacturer’s express warranty, the product did not meet that warranty, and that failure was a proximate cause of

the harm. The seller or renter could also be responsible for alleged product defect if the original manufacturer was insolvent or could not be located within the jurisdiction.

Proponents of the bill noted that, without these amendments, sellers or renters of products are often required to defend lawsuits for products they did not design or manufacture. Opponents of the bill were concerned that claimants or plaintiffs would be left without a means of recovery. Supporters noted, however, that claimants have the ability to identify Doe Defendants in their Complaint, and conduct discovery as to whether another party, including the seller, may be liable.

Despite the approval from the Nevada Legislature, Governor Brian Sandoval vetoed Senate Bill 161 on June 9, 2015. Governor Sandoval noted that, “Senate Bill 161 limits important legal remedies for Nevada consumers who have been harmed by entities that sell defective products.” Senate Bill 161 will not be addressed again until the 2017 legislative session.