



NEVADA Legal Update

Summer 2016

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

An Expert Loses the Confidentiality Protections of NRCPC 26(b)(4)(B) when an Expert Report is Disclosed

The Nevada Supreme Court recently clarified that, once an expert report has been disclosed, the expert witness cannot regain the confidentiality protections of NRCPC 26(b)(4)(B) by de-designating that witness to the status of a non-testifying expert. The district court must exercise its discretion in determining whether to allow the witness to be further deposed or called to testify by the opposing party.

Plaintiff Found Sixty Percent at Fault on Defendant's Appeal of Unfavorable Arbitration Award

Plaintiff sued Defendant hotel and casino after her motorized scooter overturned while exiting her hotel room. The arbitrator found for Plaintiff and determined that Defendant was 100 percent at fault. On appeal, the jury found Plaintiff to be 60 percent at fault.

Order Prohibiting Evidence of a Low Impact Defense Overturned as Erroneous

Provided sufficient foundation is first laid, a defendant may argue that an accident was low impact and not sufficient to cause a plaintiff's alleged damages. The argument need not be supported by a certified biomechanical engineer or other expert.

NEVADA SUPREME COURT DECISIONS

CIVIL PROCEDURE

Once an Expert Report is Disclosed, an Expert Loses the Confidentiality Protections of NRCPC 26(b)(4)(B)

Defendant Diane Collins rear-ended Plaintiff Ja Cynta McClendon's car in a motor vehicle accident. Defendant designated Dr. Eugene Appel as an expert medical witness and served an expert witness report and two supplemental expert reports. Before Plaintiff could depose Dr. Appel, Defendant de-designated him as a testifying expert witness. The district court granted Defendant a protective order under NRCPC 26(b)(4)(B), precluding Plaintiff from conducting Dr. Appel's deposition. The district court granted Defendant's motion for a protective order on the basis that the expert witness had not yet been deposed.

The Nevada Rules of Civil Procedure allow a party to depose any person who is identified as an expert, whose opinions may be presented at trial. The rule does not specify whether it applies to experts who have been designated as testifying experts, but then later de-designated. In following its federal counterparts, the Nevada Supreme Court held that once an expert report has been disclosed, the testifying expert witness cannot regain the confidentiality protections of NRCPC 26(b)(4)(B) by de-designating that witness to the status of a non-testifying expert. An expert witness loses the NRCPC 26(b)(4)(B) confidentiality at the moment an expert report is disclosed, not when the expert himself is deposed.

If the opposing party seeks to depose a de-designated expert, or call that expert to testify at trial, the district court must exercise its discretion in determining whether to allow the testimony. The district court must balance the probative value of the testimony against the danger of unfair prejudice. The district court should consider the interests of the party who originally hired the expert, as well as whether the testimony would be duplicative. The district court should also consider whether the party seeking the deposition is attempting to "piggyback" on the other party's trial preparation, and whether that party failed to identify its own expert witness. If the decision is made to allow the testimony, evidence of the expert's original retention and subsequent de-designation will not be admissible at trial. Jurors unfamiliar with the rules of civil procedure could wrongfully assume that by de-designating an expert, that party was attempting to suppress evidence that should have been offered, unfairly prejudicing the party that retained the expert.

Based on this interpretation of Rule 26(b), the Nevada Supreme Court held

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that the district court abused its discretion in granting Defendant's Motion for Protective Order. However, in any case under review, the party seeking review must show that the error was prejudicial. Plaintiff failed to produce a trial transcript on appeal, making it impossible for the Nevada Supreme Court to determine how and to what extent Plaintiff was prejudiced by the district court's order. The lack of evidence showing prejudice to Plaintiff rendered the error harmless and the judgment by the district court was affirmed. *McClendon v. Collins*, 132 Nev. Adv. Op. 28 (April 2016).

Gaming Establishments Have the Right to Exclude Any Person for Any Reason, Save Discrimination

Caesars Entertainment Corporation owns and operates a number of casinos throughout the United States, including Harrah's Tunica Hotel and Casino in Tunica, Mississippi. In 2011, Joel Slade, M.D. received a letter from Harrah's Tunica notifying him that he had been evicted from that casino. The letter indicated that Dr. Slade's eviction would be enforced by all properties owned, operated, or managed by Caesars. Hoping to attend a medical conference at the Paris Las Vegas Hotel and Casino, owned and operated by Caesars, Dr. Slade contacted Caesars and was informed that his eviction would be enforced at Paris Las Vegas.

Dr. Slade filed a complaint alleging breach of the duty of public access and sought declaratory and injunctive relief. Dr. Slade claimed that as a purveyor of public amusement or as an innkeeper, Caesars owed him a duty of reasonable access. He did not challenge a casino's right to exclude patrons for proper cause, but argued that, pursuant to the common law and NRS 463.0129(1)(e), Caesars could not exclude him without cause. Caesars responded with a motion to dismiss for failure to state a claim, and argued that it had a right to exclude Dr. Slade, or any person, pursuant to the common law and NRS 463.0129(3)(a). The district court granted Caesars' motion.

On appeal, the Nevada Supreme

Court "harmonized" NRS 463.0129(1)(e) and NRS 463.0129(3)(a) and held that gaming establishments generally have the right to exclude any person, as long as the reason for exclusion is not discriminatory or otherwise unlawful. NRS 463.0129(1)(e) provides that "all gaming establishments in this state must remain open to the general public and the access of the general public to activities must not be restricted in any manner except as provided by the Legislature." However, NRS 463.0129(3)(a) provides that this section does not "abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason."

The Nevada Supreme Court concluded that when read together, the plain language of the statutes assured access by the general public to gaming establishments, but such access was qualified by the common-law right of those establishments to eject any persons from their premises. The right to exclude any person did not extend to discriminatory or illegal reasons. Therefore, the validity of Caesars' eviction of Dr. Slade rested on the reason for eviction.

Dr. Slade did not argue the reason for eviction on appeal, he did not litigate the issue in the district court, and he did not ask to conduct discovery regarding the basis for Caesars' decision. The record was therefore unclear as to why Caesars initially evicted Dr. Slade from its property in Mississippi. It did appear, however, that Dr. Slade's exclusion from Paris Las Vegas was based on the prior eviction. Unable to determine why Dr. Slade was evicted from Caesars' Mississippi casino, the Court concluded that Dr. Slade could prove no set of facts,

which if true, would entitle him to relief.

Dissenting opinions in this matter argued that gaming establishments, when acting as innkeepers, did have a common-law duty to allow access to any patron. The majority countered, noting that such a rule would force district courts to parse out parts of a gaming establishment's premises in order to determine whether patrons may be excluded without cause. Such an outcome would be unreasonable and unrealistic. The majority also relied on legislative intent and argued that, in the context of gaming establishments, if the Legislature intended an innkeeper common-law rule be weighed against the right to exclude any person for any reason, it would have provided as much in NRS 463.0129(3). *Slade v. Caesars Entertainment Corp.*, 132 Nev. Adv. Op. 36 (May 2016).

NEVADA JURY VERDICTS

PERSONAL INJURY

Plaintiff Alleges Over \$11 Million in Damages but Jury Returns Defense Verdict

Plaintiff, a 50 year old male employed as an animal handler, was stopped at a stop sign when he was allegedly rear ended by Defendant driver, a 56 year old male in the course and scope of his occupational duties for Defendant employer, a limousine company. Plaintiff alleged injuries to his cervical and lumbar spine, which required surgical fusions

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at C5-6 and L3-4. Despite the surgical procedures, Plaintiff allegedly suffered residual pain that would require future surgical treatment. As a result of his injuries, Plaintiff claimed he was unable to perform his occupational duties and was permanently disabled.

Defendants alleged that Defendant driver stopped at the stop sign, lifted his foot off of the brake and rear-ended Plaintiff. Defendants admitted negligence, but maintained that the impact was minor and that Plaintiff was not injured. In the alternative, Defendants argued that Plaintiff sustained soft tissue injuries that should have resolved with two months of conservative therapy. Defendants further argued that Plaintiff continued to work for one month post-accident and was then terminated after an altercation with a co-worker.

At trial, Plaintiff called a neurosurgeon who testified regarding Plaintiff's surgical procedures and recommendations for future surgeries. Plaintiff also relied on the testimony of his pain management specialist, an additional neurosurgeon, a life care planner, a vocational rehabilitation expert, and an economist. Defendants called a neurosurgeon, a pain management specialist, and their own vocational rehabilitation expert to rebut Plaintiff's claims.

Plaintiff asked the jury to award \$4,548,837.78 in past and future special damages, \$3,042,000.00 in past general damages, and \$3,942,000.00 in future general damages, for a total of \$11,514,837.78. Defense counsel suggested that the jury award \$4,743.00 in medical expenses and \$1,000.00 for past pain and suffering. After an 11 day trial, the jury unanimously found for Defendants. *Williams v. Ambassador Limousine*, November 12, 2015.

Verdict for Plaintiff on Motorcycle Hit and Run

Plaintiff, a male student, was traveling on a motorcycle through an intersection with a green traffic light. Defendant driver, a female, was operating a vehicle owned by another named Defendant. Defendant allegedly executed a left turn on a blinking yellow traffic signal into Plaintiff's path of travel. Plaintiff was thrown from his motorcycle and struck

the rear passenger side of Defendant's vehicle. Defendant left the scene of the accident. As a result of the collision, Plaintiff suffered a crush injury to his hand, which required three surgical procedures and physical therapy.

Plaintiff filed a claim against Defendant driver, and asserted a claim against the vehicle's owner for negligent entrustment. Defendants argued that the Plaintiff was speeding. After a three day trial, the jury found Defendants to be 100 percent at fault and awarded Plaintiff \$130,000.00 in past medical expenses, \$135,750.00 for past pain and suffering, \$135,750.00 for future pain and suffering, and \$3,500.00 for property damage, for total damages of \$405,000.00. *Cape v. Justiano and Disimone*, November 18, 2015.

Jury Awards More than Six Times the Amount Demanded for Rear End Car Accident

Plaintiff alleged that he was rear ended by Defendant and, as a result, sustained a lumbar injury that would require a future fusion surgery, thereby impairing Plaintiff's earning capacity. Plaintiff presented a neurosurgeon, an orthopedic physician, a pain management specialist and an economist to testify at trial. Defendant relied on the testimony of an orthopedic physician, a pain management specialist, a vocational rehabilitation expert, and an economist.

Plaintiff sought compensatory damages including past medical expenses, future medical expenses, and impaired earning capacity. Plaintiff made a pretrial demand of \$100,000.00 and Defendant offered \$66,821.90. Nine days before trial Defendant increased the settlement offer to \$100,000.00. After an eight day trial, the jury awarded Plaintiff a total of \$620,000.00 in compensatory damages. *Alexander v. Mauren*, September 4, 2015.

Jury Finds Plaintiffs Were Not Injured in Motor Vehicle Accident

Plaintiffs, a male and female both in their thirties, were employed as house cleaners. Plaintiffs' vehicle was rear ended by Defendant, a female waitress. As a result of the collision, Plaintiffs allegedly sustained cervical, thoracic,

and lumbar strains and sprains, requiring chiropractic care and interventional pain management treatment. Defendant admitted negligence but argued causation, contending that the accident did not cause Plaintiffs' alleged injuries. Defendant maintained that, at most, the impact caused soft tissue injuries.

The male Plaintiff sought \$20,000.00 in medical expenses. The female Plaintiff sought nearly \$69,000.00 in medical expenses. After a five day trial, the jury unanimously found for the Defendant. *Chavez and Hernandez v. Barnett*, December 14, 2015.

MEDICAL MALPRACTICE

Defense Verdict in Gallbladder Removal

Plaintiff, a 23 year old female, who was morbidly obese with a history of gastritis and reflux, presented to Defendant doctor with complaints of right upper quadrant pain. A Hepatobiliary (HIDA) scan revealed an abnormally low gallbladder ejection fraction of six percent. Plaintiff's pain radiated to her back and was associated with nausea and heartburn, with exacerbation upon consumption of all types of food. Defendant recommended that Plaintiff's gallbladder be removed.

Plaintiff alleged that Defendant fell below the standard of care during the surgery to remove her gallbladder when he transected Plaintiff's common bile duct. Defendant denied falling below the standard of care and argued that Plaintiff was informed of the possible risks of the procedure. Plaintiff alleged that as a result of Defendant's negligence, she made multiple visits to the emergency department for excruciating pain and required additional surgical procedures.

Plaintiff sought more than \$800,000.00 in medical expenses. After a four day trial, the jury found for Defendant. *Diek v. Watson*, September 24, 2015.

Defense Verdict after Complications from Heart Surgery

Plaintiff alleged Defendant cardiologist fell below the standard of care during

a cardiac ablation procedure. Plaintiff specifically claimed that Defendant negligently used a cardiac ablation catheter and allowed excessive heat and radio frequency to burn several holes in Plaintiff's heart. The procedure allegedly caused massive cardio bleeding, zero blood pressure, zero pulse, and required life-saving, emergency open heart surgery and subsequent repair procedures.

Plaintiff claimed that Defendant negligently performed a similar procedure ten days prior and nearly killed another patient. Defendant also allegedly failed to advise Plaintiff of more conservative alternatives to the procedure and did not fully inform Plaintiff of the risks. Plaintiff also alleged that Defendant was dealing with a personal financial crisis and was distracted, and that Defendant admitted negligence to him and others immediately following the procedure.

Defendant denied falling below the standard of care and maintained that Plaintiff signed the consent form and was aware of the risks involved and the alternatives to cardiac ablation. Defendant further argued that cardiac perforation was a known complication of the procedure.

Plaintiff reportedly sustained permanent, severe injuries and was forced to retire four years early. He sought more than \$272,000.00 in medical expenses and \$380,000.00 in lost wages and retirement benefits. After a five day trial, and less than 30 minutes of deliberation, the jury unanimously found for Defendant. *Kostelnik v. Challapalli, M.D.*, October 16, 2015.

PREMISES LIABILITY

Verdict for Plaintiff in Stage Fall

Plaintiff, a 45 year old male, audio-visual vendor, was in the course and scope of his occupational duties at Defendant's convention center. As Plaintiff was walking on a stage, the stage "folded up" causing Plaintiff to fall. Plaintiff alleged that the stage was defective in design. Defendant argued that the stage was not defective and, in the alternative, if any

defects existed, Plaintiff was aware of them as he admitted walking the stage several times before the incident.

As a result of the fall, Plaintiff alleged cervical, thoracic, and lumbar soft tissue injuries, as well as torn and sprained calf muscles. He sought compensatory damages, including \$15,145.00 in medical expenses. Defendant made a pretrial offer of \$20,000.00. During closing arguments, Plaintiff's counsel asked the jury to award \$48,000.00. After a three day trial, the jury unanimously found for Plaintiff and awarded him \$15,241.00 in medical expenses and \$48,000.00 for pain and suffering, totaling \$63,241.00. *Beukema v. MGM Grand Hotel, LLC*, January 21, 2016.

Jury Finds Comparative Fault in Sticky Slip and Fall

While a patron at Defendant's resort, Plaintiff, a 58 year old female, stepped on a sticky substance that caused her to fall. She alleged that Defendant was negligent in its maintenance of the premises and allowed liquid on the floor to dry and become sticky. Defendant denied liability and argued that Plaintiff was comparatively at fault.

Plaintiff reportedly sustained a meniscus tear of the right knee and a cervical injury requiring a three-level fusion. At trial, Plaintiff relied on the testimony of two orthopedic physicians, who testified that she required a three-level cervical fusion and a surgical repair of the meniscus tear. Defendant presented a sports medicine specialist who was of the opinion that Plaintiff had symptom magnification and sought secondary gain.

Plaintiff served a pretrial offer of judgment for \$49,999.00. Defendant offered \$2,500.00. During closing arguments, Plaintiff's counsel asked the jury to award \$150,000.00 for past pain and suffering, plus \$250,000.00 for future pain and suffering. Defense counsel argued liability and maintained that Plaintiff was not actually injured. After a seven day trial, the jury awarded Plaintiff \$400,000.00 in compensatory damages, but found Plaintiff to be 40 percent at fault. Plaintiff's award was therefore reduced to \$240,000.00. *O'Connell v. Wynn Resorts, LLC*, November 16, 2015

Plaintiff Found Sixty Percent at Fault on Appeal of Arbitration Award

Plaintiff was a guest at Defendant's hotel, and rented a motorized scooter for use throughout the hotel and casino. Plaintiff was attempting to exit her room with the motorized scooter when the door allegedly closed on the scooter, causing it to overturn, and causing Plaintiff to fall on the floor. Plaintiff sustained unspecified injuries. She alleged that Defendant should have been on notice of the dangerous and unsafe condition. Defendant denied liability, or in the alternative, argued that Plaintiff was comparatively at fault.

The case was being tried on Defendant's appeal of a \$32,000.00 arbitration award in Plaintiff's favor and a finding that Defendant was 100 percent at fault. Plaintiff sought \$15,000.00 in stipulated medical expenses, plus an unspecified amount for lost wages. After a one day short trial, the jury awarded Plaintiff \$15,100.10 in past medical expenses and \$8,000.00 for pain and suffering, for a total award of \$23,100.10. However, the jury also found Plaintiff to be 60 percent at fault and she therefore recovered nothing, pursuant to Nevada's comparative negligence statutes. *Blue v. Paris Las Vegas Operating Company*, November 20, 2015.

BREACH OF CONTRACT

Defendant Liable for Breach of Contract After Significant Credit Line Increase

Defendant, a resident of Italy, had been a patron at Plaintiff's gaming establishment since 2009. Defendant executed a credit agreement with Plaintiff, allowing Defendant to gamble on credit. In September 2011, Defendant executed a credit line increase to \$700,000.00. The following day, Defendant agreed to an additional credit line increase to \$800,000.00. During these two days, Defendant executed ten casino markers totaling \$800,000.00. In November 2011 and March 2012, Plaintiff tried

unsuccessfully to seek payment from Defendant. Plaintiff deposited the casino markers with Defendant's bank account, but they were not honored because Defendant refused payment.

Plaintiff filed suit, alleging that Defendant breached the credit agreement when he refused to pay the casino markers. Plaintiff also alleged that Defendant intended to defraud Plaintiff, as he knew he lacked the funds to satisfy the casino markers. Defendant had reportedly incurred a \$1,015,000.00 debt with the MGM Grand Hotel only two weeks before visiting Plaintiff's casino. Defendant denied liability and argued that at the time he signed the casino markers, he was intoxicated, deficient in the English language, and had a gambling addiction.

Plaintiff prayed for \$800,000.00 in damages and made a pretrial demand for the same amount. Defendant offered \$200,000.00. After a four day trial, the jury unanimously awarded Plaintiff \$450,000.00 in compensatory damages for the breach of contract and conversion claims, but found for the Defendant on the claims for fraud and the breach of the covenant of good faith and fair dealing. *Wynn Las Vegas, LLC v. Tofani*, December 4, 2015.

COMMENTS

Trial Court's Order Excluding Evidence in Support of a Low Impact Defense Overturned as Erroneous

The Nevada Supreme Court recently clarified its earlier decision in *Hallmark v. Eldridge*, 124 Nev. 492 (2008), and held that, with or without an expert, evidence of a low impact defense is permissible so long as the proper foundation is laid.

In *Rish v. Simao*, 132 Nev. Adv. Op. 17 (March 2016), Defendant Jenny Rish and Plaintiff William Simao were involved in a motor vehicle collision in which Defendant rear ended Plaintiff in stop-and-go traffic. Plaintiff brought suit against Defendant alleging the accident caused injuries to his head and neck, resulting in constant pain and requiring

ongoing medical treatment.

Before the start of trial, Plaintiff filed a motion *in limine* seeking to preclude Defendant from introducing evidence in support of a low impact defense and specifically seeking to exclude any argument that the collision was too insignificant to have caused Plaintiff's injuries. The motion also sought to exclude photographs of the vehicle and repair invoices because, without expert testimony, there was no correlation between the extent of the property damage and the extent of the alleged injuries. Defendant opposed the motion arguing that physicians have always been permitted to consider the severity of the accident when formulating opinions as to whether the force could have caused the injury. The district court, citing *Hallmark v. Eldridge*, granted the motion and concluded that Defendant had not retained a biomechanical engineer who could first lay the foundation for the defense and testify that the collision was too insignificant to cause the injury. The district court's order prohibited Defendant from raising the low impact defense, and excluded any photographs of the vehicles and property damage invoices.

Defendant's counsel unsuccessfully sought clarification of the order on multiple occasions during the trial, but reportedly violated the order eight times. During opening statements, defense counsel attempted to play a portion of Defendant's videotaped deposition but was prevented from doing so because the tape contained testimony concerning the accident. During cross examination of a defense medical expert, the doctor's answers were stricken because he answered a question based on the facts of the accident. At this point, upon Plaintiff's request, the district court instructed the jury that there was an irrebuttable presumption that the accident was sufficient to cause the injuries claimed by Plaintiff. Defense counsel violated the pre-trial order again on two separate occasions when he asked Plaintiff if the traffic was stop and go and whether the paramedics transported anyone from the scene. Based on these last two violations of the pre-trial order, the trial court granted Plaintiff's motion to strike Defendant's Answer and entered a default judgment against Defendant,

totaling nearly \$4.5 million.

On appeal, the Nevada Supreme Court reversed the order and remanded the entire case back for trial, finding an abuse of discretion by the district court. In issuing the order prohibiting Defendant from offering evidence in support of a low impact defense, the district court relied heavily on *Hallmark*. The Nevada Supreme Court concluded, however, that the district court's interpretation of *Hallmark* was flawed. In *Hallmark*, the expert witness, both a mechanical engineer and physician, testified in support of a low impact defense without an adequate factual or scientific basis for his testimony. The expert failed to review critical information when he formed his opinion, and the Nevada Supreme Court subsequently determined that his testimony was inadmissible. The trial court interpreted *Hallmark* as requiring testimony from an expert, biomechanical or otherwise, to present the low impact defense. The Nevada Supreme Court clarified that *Hallmark* only required an expert to have an adequate factual or scientific basis for his opinion in order for his testimony to be admissible. Thus, the district court's order was erroneous as a matter of law.

The Court also addressed the validity of the sanctions imposed on Defendant. Generally, a party is required to follow court orders until the order is overturned and any sanctions based on violations of the same may remain despite an ultimate finding that the order was erroneous. In deciding whether sanctions issued for violating an erroneous order must be overturned, Nevada courts analyze three factors: (1) the specificity of the order; (2) the clarity of the violation; and (3) the unfair prejudice by the issuance of the sanction.

In *Rish*, the Court found that the district court's order regarding admission of the evidence lacked specificity because of the inconsistency of its application. The order prohibited Defendant from raising a low impact defense, but did not specify or give guidance as to what was precluded and instead was broadly interpreted to preclude *any* facts about the accident itself. The Nevada Supreme Court noted that this lack of specificity made it difficult for Defendant to carefully



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follow the trial court's order. The Supreme Court also took issue with the district court's finding of violations, even when the accident itself was not described. Moreover, the trial court did not provide an explanation as to how the alleged violations warranted a case-ending sanction, but stated only that "no lesser sanction had been successful in precluding future violations." The Nevada Supreme Court held that the district court order was not only invalid, but any misconduct or violation committed by Defendant's counsel did not justify entering a default judgment against Defendant.

Rish makes clear that, provided sufficient foundation is first laid, defendants are permitted to argue that an accident was low impact and not sufficient to cause a plaintiff's alleged damages. More importantly, such an argument need not be supported by a certified biomechanical engineer or other expert before a defendant will be allowed to present a low impact defense. Evidence such as photographs and property damage appraisals should generally be admissible

as there is a common-sense correlation between the nature of the impact and the severity of the injuries. *Rish* also confirms that medical doctors may testify as to the severity of the impact in relation to a plaintiff's alleged damages. In addition to upholding the low impact defense, the *Rish* decision clarified the holding in *Hallmark* which had since been widely extended and used by plaintiffs in attempts to exclude defense biomechanical and accident reconstruction experts.
