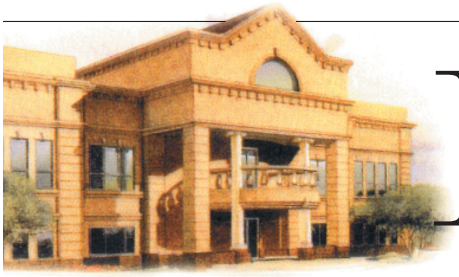

NEVADA
Legal Update
Fall 2016

Alverson Taylor Mortensen & Sanders • *Nevada's Law Firm*

Highlights

Plaintiff Must Include Expert Affidavits for Medical Malpractice Claims Based on Lack of Informed Consent

When the scope of consent for a medical procedure is at issue, the plaintiff must include an expert affidavit with the original complaint or the case will be dismissed. Claims for battery, where a plaintiff allegedly gave no consent, are not considered medical malpractice claims and therefore do not require an expert affidavit.

Plaintiff Verdict in Excess of $6,000,000 for Low Speed Motor Vehicle Collision

Plaintiff sought past and future medical damages of approximately $1,500,000.00 million following a motor vehicle collision. Plaintiff claimed a variety of injuries, including thoracic and lumbar strains and sprains. In addition to past and future medical expenses, Plaintiff was awarded more than $5,000,000.00 for past and future pain and suffering.

Professional Medical Associations in Professional Negligence Actions are Protected by the Noneconomic Damages Cap Set Forth in NRS 41A.035

The Nevada Supreme Court recently held that professional medical associations and entities are included in the statutory definition of "provider of healthcare." Therefore, the $350,000.00 cap on noneconomic damages, as provided by NRS 41A.035, applied to professional medical associations as well as defendant doctors.

Nevada Supreme Court Decisions

Medical Malpractice

Plaintiffs in Medical Malpractice Cases Must Include Expert Affidavits in Support of Complaints Based on Lack of Informed Consent

Defendant Dr. Sharon McIntyre surgically implanted an intrauterine device (IUD) into Plaintiff Kelli Barrett at Defendant Humboldt General Hospital. One year after the surgery, Plaintiff discovered the IUD was not approved by the Federal Drug Administration (FDA) because the IUD was shipped from Finland to Canada, rather than to the United States. The IUD was identical to one approved by the FDA.

Plaintiff filed a complaint against Dr. McIntyre and Humboldt General Hospital alleging negligence and battery, but did not include a supporting medical expert affidavit. Defendants filed a motion to dismiss which was granted by the district court as to the negligence claim, but denied as to the claim for battery. Defendants filed a writ with the Nevada Supreme Court, requesting that the battery claim also be dismissed.

NRS 41A.071 requires a plaintiff in a medical malpractice lawsuit to include a supporting medical expert affidavit. NRS 41A.009 defines medical malpractice as "the failure of a physician [or] hospital...in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances." NRS 41A.110 defines informed consent, and states that informed consent is given when a physician has explained in general terms the procedure to be performed.

The Court made the distinction between claims based on informed consent and battery. Battery arises if the patient gave *no consent* to the treatment performed and the doctor treated the patient without that consent. The patient only has to prove that no consent was given and unconsented touching occurred. In contrast, a claim based on lack of informed consent arises when the patient consents to a particular treatment but there is an issue as to whether the physician acted within the scope of the patient's consent. The Court concluded that the plaintiff did not have to include an expert affidavit for the battery claim, but an expert medical affidavit was required as to whether the treatment provided was within the scope of the informed consent.

In This Issue

Because Plaintiff alleged that she did not give consent to the non-FDA approved IUD, rather than not giving *any* consent, the claim was based on lack of informed consent, despite the fact that it was identified in the Complaint as battery. Plaintiff's claim was therefore governed by the medical malpractice statutes and she was required to include a medical expert affidavit. Because Plaintiff did not include the necessary affidavit, the district court erred in denying Defendants' motion to dismiss. *Humboldt Gen. Hospital v. Sixth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 53 (July 2016).

Jury Selection

Questions Regarding Specific Damages are Appropriate for Voir Dire

Defendant Raymond Riad Khoury rear-ended the vehicle of Plaintiff Margaret Seastrand. After the accident, Plaintiff received treatment and underwent surgery for her neck and back. Plaintiff sued Defendant to recover her damages. Defendant stipulated to liability but contested the medical causation, proximate cause, and damages, maintaining that Plaintiff's injuries were preexisting and were not caused by the accident.

During voir dire, Plaintiff was permitted to ask potential jurors whether they were hesitant to award damages in excess of $2,000,000.00. Plaintiff then sought to disqualify five jurors for cause claiming they were biased against awarding a large sum. The district court granted the motion. In opposing the request, Defendant argued it was "per se improper" to ask jurors about a specific dollar amount. Defendant maintained that this type of questioning "improperly implanted a numerical value in the minds of the jury." Defendant also filed a motion for a mistrial claiming it was improper to dismiss the five jurors based on their opinions as to a large verdict.

Voir dire allows an attorney to acquire information about potential jurors' opinions and beliefs. An attorney can abuse this process by indoctrinating ideas, facts, and beliefs into the jurors' minds. Previous courts have held that asking about specific dollar amounts was not indoctrination because it allowed the attorneys to discover who was biased against awarding a large sum of money. The Nevada Supreme Court agreed with this holding.

The Court held that using a specific dollar amount in voir dire was not *per se* improper. The Court explained that questions regarding a specific dollar amount may assist in evaluating a potential juror's opinion on excessive damages. Vague adjectives, such as "large" may be insufficient and could be construed differently by each juror. It is within the district court's discretion to determine whether this type of questioning is permissible, and the district court did not abuse its discretion in permitting Plaintiff to ask about a specific damage amount.

Defendant also argued that the district court abused its discretion by dismissing the five jurors for cause, as potential hesitation in granting large verdict amounts was not a form of bias. A juror is considered bias if his views prevent him from applying the law to the facts when rendering a verdict. The district court held that the five jurors were biased because they were predisposed against awarding a large amount of damages, which would prevent them from applying the facts to the law. The Nevada Supreme Court held that potential bias is insufficient to dismiss a potential juror for cause. The juror must demonstrate actual bias that would prevent him from apply the law to the facts. To determine actual bias, the district court must look at the jurors' statements as a whole.

The Court ultimately concluded that the district court abused its discretion by dismissing five jurors for cause, based on potential bias and concerns about awarding a large verdict amount. This was, however, determined to be a harmless error and the district court's denial of Defendant's motion for a mistrial was affirmed. *Khoury v. Seastrand*, 123 Nev. Adv. Op. 52 (July 2016).

NEVADA JURY VERDICTS

Personal Injury

Defense Verdict Following Dispute at Convenience Store

Plaintiff, a male customer at a non-party convenience store, alleged that he and Defendant, a store employee, had a verbal dispute regarding Plaintiff's coffee cup. Plaintiff alleged that Defendant punched him in the head, knocking him unconscious. Defendant denied liability arguing that Plaintiff initiated the altercation by throwing scalding coffee

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at him. Defendant also maintained that Plaintiff did not actually lose consciousness.

Plaintiff alleged he suffered emotional trauma due to Defendant's action and sought compensatory damages. After a one day short trial, the jurors unanimously found for Defendant. *Henry v. Davis*, April 1, 2016.

Defense Verdict after Detached Tire Strikes Vehicle

Plaintiff, an 82 year old retired male, alleged that a tire on Defendant's vehicle failed, causing the wheel to detach from the vehicle and strike the car in which Plaintiff was a passenger. The impact of the tire allegedly caused the vehicle Plaintiff was riding in to strike the guardrail. Plaintiff alleged that Defendant failed to properly maintain his tires, thereby resulting in the accident. Defendant, a 71 year old retired male, denied liability asserting he had no notice that his tire would fail, and that he had no idea why the wheel assembly detached from his vehicle.

As a result of the collision, Plaintiff allegedly suffered a closed head injury, traumatic brain damage, and lacerations to the forehead. At trial, Plaintiff relied on the testimony of a neurologist who opined that Plaintiff suffered traumatic brain damage. The neurologist also testified, however, that the cause of Plaintiff's ongoing cognitive problems was unknown. Defendant relied on the testimony of another neurologist who asserted that Plaintiff did not suffer traumatic brain damage and made up answers during his medical examinations in an attempt to increase his damages.

Plaintiff sought $13,302.43 in medical expenses and made a pre-trial settlement demand of $40,000.00. Defendant offered $30,000.00. After a five day trial, the jury unanimously found for Defendant. *Schlasta v. Mertz*, April 25, 2016.

Plaintiff Recovers More Than $6,000,000 as a Result of Lane Changing Collision

Plaintiff, a 30 year old male employed as an automotive mechanic, alleged that Defendant made an unsafe lane change into Plaintiff's lane of travel, causing the two vehicles to collide. Defendant, a 58 year old male employed as a physician, denied liability and maintained that he was only traveling 10 to 15 miles per hour when Plaintiff came out of nowhere and caused the accident.

As a result of the accident, Plaintiff allegedly suffered thoracic and lumbar strains and sprains; bilateral hip contusions; and left thigh strain and sprain. Additionally, Plaintiff claimed to suffer from lumbar radiculopathy and lumbar facet syndrome, a bulging lumbar disk, a bulging lumbar lumbosacral disk, and central lumbar stenosis. Plaintiff claimed that he was on permanent work restriction and would require a future spinal cord stimulator.

Plaintiff called an accident reconstructionist to testify at trial. He also relied on the testimony of an orthopedic physician who opined that Plaintiff's surgery and injuries were causally related to the accident. Plaintiff also relied on the testimony of a pain management specialist, an economist, a psychiatrist, and a vocational rehabilitation expert who asserted that Plaintiff was limited in his ability to maintain employment. Defendant relied on the testimony of an orthopedic physician who asserted that Plaintiff's fusion surgery was unrelated. Defendant also called a vocational rehabilitation expert and an economist to rebut the opinions of Plaintiff's experts.

Plaintiff sought $404,000.00 for past medical expenses and $1,158,000.00 for future medical expenses. Plaintiff made a pretrial demand for $1,000,000.00, but Defendant only offered $250,000.00. During closing arguments, Plaintiff asked the jury to award an additional $5,600,000.00 for pain and suffering. Defendant maintained that he was not liable for Plaintiff's injuries, but in the alternative, asserted that $50,000.00 to $100,000.00 was a sufficient award.

After a nine day trial, a jury found for Plaintiff and awarded $404,011.87 for past medical expenses, $1,158,224.00 for future medical expenses, $600,000.00 for past pain and suffering, and $4,533,300.00 for future pain and suffering. The verdict for Plaintiff totaled $6,695,535.87. *Volungis v. Abdulla*, May 6, 2016.

Defense Verdict After Low-Impact Collision

Plaintiff, a 28 year old unemployed male, was rear-ended by a vehicle operated by Defendant, a 19 year old male student. Plaintiff's son was a passenger in the vehicle. Plaintiff allegedly suffered cervical, thoracic, lumbar, and sacral strains and sprains, as well as a bulging lumbar disk with nerve root involvement and an annular tear. Plaintiff claimed the need for ongoing physical therapy. Defendant admitted negligence, but argued that Plaintiff's alleged injuries were not causally related to the accident. Defendant maintained that the impact was a minor bumper tap and the Plaintiff was not injured. Defendant called an accident reconstructionist who opined that it was a low-impact collision.

Plaintiff sought compensatory damages, including $14,294.25 in medical expenses. Plaintiff made a pretrial settlement demand of $15,000.00 and Defendant offered $100.00. During closing arguments, Plaintiff asserted that witnessing his young, frightened son after the accident was part of his pain and suffering. The defense argued the impact was minor

and no one was injured. After a one day short trial, the jurors unanimously found in favor of Defendant. *Delpoza v. Wilson*, May 13, 2016.

Jury Finds for Defendant Following Motor Vehicle Collision

Plaintiff, a female blackjack dealer, alleged that while she was driving at 40 to 45 miles per hour she was reared ended by Defendant, a 22 year old male employed as an air conditioning and heating technician. Defendant denied liability and argued that Plaintiff made an unsafe lane change into Defendant's lane of travel after she realized she was in the wrong lane. Defendant also asserted that Plaintiff failed to maintain a proper speed, without justification. As a result of the collision, Plaintiff claimed to have suffered cervical and lumbar strains and sprains, and a shoulder strain and sprain.

At trial, Defendant relied on the testimony of a biochemical engineer who estimated that Plaintiff was traveling between eight and twelve miles per hour. Plaintiff relied on the medical reports of three pain medical specialists who opined that Plaintiff's injuries were causally related to the accident.

Plaintiff sought $9,000.00 in medical expenses. Plaintiff made a pretrial demand of $12,000.00 and Defendant offered $700.00. After a one day trial, the jury returned a verdict for Defendant. *Adam v. Hirschey*, May 27, 2016.

Medical Malpractice

Defense Verdict After Decedent Died From Abdominal Illness

Defendants treated Decedent, a 62 year old female, after she complained of four to five days of abdominal pressure and pain while urinating. Decedent's pulse was 123. Defendants performed a dip urine test. Decedent was diagnosed with pyelonephritis (inflammation of the kidney caused by a bacterial infection), given an injection of Rocephin, and sent home with a prescription for Cipro. Thirteen days later, Decedent was taken by ambulance to a non-party hospital complaining of abdominal pain. The hospital performed a CT scan which revealed a perforated sigmoid diverticulitis with an abscess. Surgery was performed, but Decedent died two days later of severe peritonitis, abdominal septic shock, and multi-organ failure.

Plaintiff, Decedent's spouse, alleged Defendant Schlaack, an emergency medical specialist, and Defendant Hilmes, a physician's assistant, fell below the standard of care by not performing necessary examinations and testing. Plaintiff specifically claimed that Defendants failed to treat Decedent's elevated pulse, failed to transfer her to a different medical facility, and did not properly diagnose Decedent's condition. Defendants denied falling below the standard of care. During trial, the court entered a directed verdict in favor of Defendant Schlaack.

Plaintiff sought $150,294.55 for medical expenses and $152,254.00 for lost earning capacity, as well as punitive damages. After a five day jury trial, the jury found for the remaining Defendants. *Lauricella v. Legacy Urgent Care, Schlaack, M.D., and Hilmes, PA-C*, April 8, 2016.

Jury Returns Verdict for Defendant Regarding Alleged Failed Spinal Surgery

Decedent initially injured his spine while playing football with his grandchild. Three months later, Decedent tripped over his dog and was transported to the hospital. Defendant, the treating physician, diagnosed several lumbar vertebral fractures and recommended non-emergent spinal surgery. After an anterior lumbar fusion, Decedent's health began to deteriorate. It was discovered that internal hardware placed during the surgery had dislodged and caused another fracture in Decedent's back. Defendant performed revision surgery to correct the anterior fusion and to insert hardware in the posterior spine.

After the second surgery, Decedent's health continued to deteriorate and he suffered renal failure, obstruction of the bowels, and anemia. Decedent had free fluid in his pelvis, a distended stomach, and onset of pneumonia. Five days prior to his death, Decedent was diagnosed with blood clots in his nephrostomy tube and an aortic pseudo-aneurysm. Decedent died on June 30, 2010, eight months after his first back surgery.

Plaintiffs alleged Defendant fell below the standard of care when he failed to perform a posterior stabilization of Decedent's lumbar spine in addition to the anterior procedure, and failed to properly relieve Decedent's spinal stenosis. Plaintiffs also alleged that Defendant's negligence caused Decedent to require a second lumbar surgery, which resulted in complications and Decedent's death. Defendant maintained that he did not fall below the standard of care.

Plaintiffs called a neurologist, a vascular surgeon, an infectious disease specialist, and an economist to testify at trial. Defendant relied on the expert testimony of a vascular surgeon. After an eight day trial, and six hours of deliberation, the jury returned a verdict for Defendant. *Estate of Kimball v. Capanna*, May 13, 2016.

Premises Liability

Plaintiff Found 51 Percent at Fault after Hitting His Head on an Advertisement Frame

Plaintiff, a 70 year old female and retired Nevada resident, was walking through Defendant's entrance, turned a corner, and hit her head on the corner of an advertisement frame. Plaintiff

claimed that the frame was protruding from the wall in an unsafe and dangerous manner. After hitting her head, Plaintiff fell to the ground, blacked out, and sustained a closed head injury.

At trial, Plaintiff called a mechanical engineer who testified that Defendant's sign placement violated the Uniform Building Code and the Americans' With Disabilities Act. Defendant called a construction expert, who opined that the company was not liable because the sign was open and obvious.

Plaintiff sought $21,984.00 in medical expenses. After a one day trial, the jury awarded $22,000.00 in medical expenses and $8,000.00 in pain and suffering for a total award of $30,000.00. The jury also found Plaintiff to be 51 percent at fault, thereby negating any recovery. *Boulder v. Station Casinos, L.L.C.*, May 20, 2016.

Jury Determines Metal Hook Was Not Dangerous

Plaintiff, a two year old female, alleged that a metal display hook on Defendants' candy display was unreasonably dangerous. The minor Plaintiff suffered lacerations to the eyelid and required stitches. Defendants denied liability and maintained that the display was not unreasonably dangerous and was common throughout grocery stores. Defendants also alleged that Plaintiff's mother accidentally pushed Plaintiff, causing her to fall into the candy display.

At trial, Plaintiff called a human factor engineer who opined that the hook on the display was a dangerous condition and a safer alternative should have been used. Defendants relied on the deposition of a human factors engineer who asserted that the metal hooks were not sharp and did not constitute a dangerous condition.

Plaintiff sought $3,383.00 in medical expenses. After a one day trial, and one hour of deliberations, the jury unanimously found in favor of Defendants. *Medina v. Mariana's Enterprises and Candies Tolteca Co.*, May 27, 2016.

Breach Of Contract

Judgment as a Matter of Law for Defendant Lessor

Plaintiff, Defendant, and a non-party entered into a business lease. Plaintiff leased 3,200 square feet of space from Defendant and the non-party provided management services. There was, however, only 3,042 square feet available. The lease also provided that Plaintiff could lease or own and maintain 15 slot machines. In order to keep the slot machines, Plaintiff had a separate contract with a gaming vendor.

Defendant sent Plaintiff a key indicating that the rental space was ready for use; however, upon inspection, Plaintiff discovered issues with the prior tenant's personal property still present on the premises. There were also issues with the plumbing and electrical systems. These issues were brought to Defendant's attention, but Defendant allegedly failed to correct the issues with the plumbing and electricity. The property was not actually ready to be used until five months after the lease was signed, thereby preventing Plaintiff from opening the store as planned. The parties reportedly entered into an agreement whereby the rent for the first two months was not due, but Defendant charged the rent anyway.

Plaintiff also alleged that, even after the opening, Defendant placed a "for lease" sign above Plaintiff's store making it appear that the store was unoccupied. Defendant also allegedly delayed illuminating Plaintiff's sign and trees covered the sign. Plaintiff further claimed that Defendant's delay prevented Plaintiff from contracting for gaming and obtaining additional slot machines. Defendant also failed to correct known security issues which ultimately led to the close of Plaintiff's business. Defendant refused to return Plaintiff's security deposit after he vacated the premises.

At trial, Plaintiff called an accountant who opined that, as a result of Defendant's actions, Plaintiff lost profits and incurred additional expenses. Defendant denied liability. Plaintiff sought $771,849.76 in compensatory damages. Five days into the trial, the judge granted Defendant's Motion for Judgment as a Matter of Law. *City Discount Liquor and Ahuja v. Aspen Development, Inc.*, May 11. 2016.

Comments

Professional Medical Associations in Professional Negligence Actions are Protected by the Noneconomic Damages Cap Set Forth in NRS 41A.035

In *Zang v. Barnes*, decided in September 2016, Dillon Barnes sued Ren Yu Zhang, M.D. and his employer, Nevada Surgery and Cancer Care, LLP (NSCC). Plaintiff alleged medical malpractice and negligent hiring, training, and supervision, after a surgery left Mr. Barnes with severe burns. The jury awarded Mr. Barnes $2,243,988.00 in damages, of which $2,000,000.00 was for past and future pain and suffering.

Defendants asked the court to apply the $350,000.00 cap on noneconomic damages, pursuant to NRS 41A.035, to both Dr. Zhang and NSCC. The district court applied the $350,000.00 cap on noneconomic damages to Dr. Zhang, but refused to apply the cap to NSCC. The trial court therefore entered a judgment awarding Mr. Barnes $411,579.09 from Dr. Zhang and $1,243,988.00 from NSCC.

On appeal, the Nevada Supreme Court considered whether NRS 41A.035 limited NSCC's liability for noneconomic damages to $350,000.00, as it did for Dr. Zhang. The applicable 2004 version of the statute provided:

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> In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000.00.

NRS 41A.035 (2004). NSCC argued that, as a professional medical association, its liability was derivative of Dr. Zhang's and its liability could not exceed his. Plaintiff asserted that NSCC, as a professional medical association, did not meet the statutory definition of "provider of health care" and that liability for negligent hiring, training, and supervision was not "based upon professional negligence."

In holding that NRS 41A.035 applied to professional medical associations as well as defendant doctors, the Court relied on its earlier decision in *Fierle v. Perez*, 125 Nev. 728 (2009). In *Fierle*, the Court recognized that professional medical entities were not mentioned in the list of persons who could commit medical malpractice. However, the Court looked to NRS Chapter 89, which extended the expert affidavit requirement to the defendant physician's professional medical corporation. The Court in *Fierle* stated that "the provisions of NRS Chapter 41A must be read to include professional medical corporations." Accordingly, the Court concluded that NSCC was a "provider of healthcare" for purposes of the NRS 41A.035 cap on noneconomic damages in a professional negligence action. The Court also noted that the 2015 amendment to NRS 41A.035 added the phrase "regardless of the number of plaintiffs, defendants or theories upon which liability may be based."

After concluding that the $350,000.00 cap on noneconomic damages applied to NSCC, the Court was left to determine whether Plaintiff's claims against NSCC constituted "professional negligence." Given the broad definition of the term "professional negligence," the Court concluded that "a case-by-case approach is appropriate to determine whether a professional negligence statue applies to claims grounded on legal theories besides malpractice." The Court also referred to cases from other jurisdictions which held that when claims such as negligent hiring are inextricably linked to the underlying professional negligence of a physician, the negligent hiring claim is more akin to vicarious liability than an independent tort. It was clear the allegations against NSCC were rooted in Dr. Zhang's alleged professional negligence. As such, Plaintiff's claims against NSCC were subject to the statutory cap on noneconomic damages.