



NEVADA Legal Update

Spring 2017

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

Insurers Only Reimbursed for Damages Recoverable through Workers' Compensation

The Nevada Supreme Court recently held that an insurance company is not entitled to reimbursement for portions of a third-party settlement that compensated an injured worker for damages that could not be recovered through workers' compensation. Workers' compensation administrative officers must also first determine whether an injured worker can reopen his claim before addressing any issues of reimbursement.

Apartment Fire Ultimately Results in Defense Verdict

Decedent's surviving parents filed a wrongful death action claiming the apartment complex was liable for an apartment fire that caused their son's death. Plaintiffs maintain the fire was caused by a refurbished refrigerator and that Defendants failed to maintain smoke detectors and fire alarms. The jury returned a verdict for Defendants.

Amendments to the Local Rules for the U.S. District Court for the District of Nevada

The United States District Court District of Nevada issued an order with a significant number of amendments to the local rules of civil practice. These amendments include changes to the meet-and-confer standard, page limitation changes for motions and responses, and new rules regarding case-related correspondence with the court.

NEVADA SUPREME COURT DECISIONS

WORKERS' COMPENSATION

Insurers May Only be Reimbursed for Damages from Third-Party Settlements Otherwise Recoverable through Workers' Compensation

Plaintiff William Poremba, a construction worker, was an employee of Defendant Southern Nevada Paving. In 2005, a backhoe driver struck Mr. Poremba while he was driving a truck in the course and scope of his employment. As a result of the accident, Mr. Poremba sustained head, neck, back and knee injuries. He filed a workers' compensation claim with Southern Nevada Paving, who accepted the claim through Defendant S&C Claims. S&C Claims later closed the claim and delivered correspondence to Mr. Poremba with instructions for reopening the claim if his medical condition changed.

Mr. Poremba subsequently filed a personal injury suit against the driver of the backhoe and that matter was settled for \$63,500.00. The settlement agreement did not identify how the settlement funds were to be allocated. Mr. Poremba personally received only \$34,631.51 of the total settlement proceeds because \$28,868.49 was paid directly toward healthcare providers' liens. Mr. Poremba spent approximately \$14,000.00 of the amount he personally received for subsequent medical treatment.

As of 2013, Mr. Poremba's injuries still prevented him from returning to

work and he therefore attempted to reopen his claim. His request was denied by S&C Claims and Mr. Poremba filed an administrative appeal. In response, S&C Claims moved for summary judgment and asserted that Mr. Poremba could not reopen his claim because he spent a portion of his settlement funds on non-medical expenses. The administrative appeals officer granted S&C Claims' motion for summary judgment. Mr. Poremba filed a petition in district court for judicial review of the administrative decision, but the district court denied his petition. Mr. Poremba appealed to the Nevada Supreme Court.

Pursuant to Nevada Revised Statute 616C.215(2)(a), an injured employee's workers' compensation must be reduced by the damages received from the responsible party. In accordance with this statute, the Nevada Supreme Court previously held that an insurer may withhold medical benefits until third-party settlement funds are exhausted. See *Employers Insurance Co. of Nevada v. Chandler*, 117 Nev. 421, 426 (2001). Notably, however, *Chandler* did not specifically identify the types of funds that must first be exhausted. While NRS

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616C.215(2)(a) was intended to prevent double recovery, this policy only applied to expenses an employer could actually recover from workers' compensation claims. A plaintiff could recover types of damages in a tort claim that he could not recover from workers' compensation, including damages for pain and suffering. Thus, the Nevada Supreme Court held that an insurer did not have the right to be reimbursed for damages not covered by workers' compensation, as this did not violate the policy of double recovery. Mr. Poremba's settlement agreement did not specify how the settlement funds were allocated in terms of types of damages. Given the settlement amount, the Nevada Supreme Court reasoned that Mr. Poremba's settlement funds likely included pain and suffering.

Additionally, the Nevada Supreme Court found that the administrative judge erred in denying Mr. Poremba's request to reopen his workers' compensation claim because he spent settlement funds on non-medical expenses. An administrative officer must first determine whether an employee can reopen his workers' compensation claim in accordance with NRS 616C.390 before addressing any issues of reimbursement. NRS 616C.390 does not require a claimant to exhaust third-party settlement funds before reopening a workers' compensation claim.

The Nevada Supreme Court reversed the district court's denial of Mr. Poremba's petition for judicial review and the case was remanded to the administrative appeals officer with instructions to conduct a full administrative hearing. If the administrative hearing officer found that Mr. Poremba could reopen his claim, the officer was then required to determine any offset due and owing to S&C Claims, consistent with the Court's decision. *William Poremba v Southern Nevada Paving and S&C Claims Services, Inc.*, 133 Nev. Adv. Op. 2 (Jan. 2017).

Nonpayment of Judgment Statutes

Plaintiff, Jesus Manuel Briones, sued Defendant, Geneva Simmons, for injuries and property damages sustained in a motor vehicle accident that occurred in August 2010. The case proceeded to the mandatory court-annexed arbitration program. The arbitrator determined that Mr. Briones and Ms. Simmons were each 50 percent negligent and Mr. Briones' damages award was therefore reduced by half.

On appeal, the case was tried in Nevada's Short Trial Program and Mr. Briones was again determined to be 50 percent negligent. Ms. Simmons was awarded attorney's fees and costs, pursuant to Rule 20(B)(2)(a) of the Nevada Arbitration Rules. NAR 20(B)(2)(a) provides that when a party requesting trial *de novo* "fails to obtain a judgment that exceeds the arbitration award by at least 20 percent of the award, the non-requesting party is entitled to its attorney's fees and costs associated with the proceedings following the request for trial *de novo*." The short trial judge entered a net judgment in Ms. Simmons' favor for the attorney's fees and costs.

Mr. Briones failed to pay the judgment and Ms. Simmons requested that the Nevada Department of Motor Vehicles (DMV) revoke Mr. Briones' driving privileges until he paid the judgment. Ms. Simmons' request was based on NRS 485.302 and NRS 483.305, nonpayment of judgment statutes. The DMV granted Ms. Simmons' request and suspended Mr. Briones' driving privileges.

Mr. Briones subsequently challenged the suspension at an administrative hearing, arguing that NRS 485.302

and 485.305 did not apply because he was an insured driver and the judgment was only for attorney's fees and costs. The administrative law judge found in Mr. Briones' favor and reinstated his driving privileges. Ms. Simmons filed a petition for judicial review with the district court. The district court similarly found that Chapter 485 did not apply to insured drivers and denied the petition. Ms. Simmons appealed to the Nevada Supreme Court.

The parties disagreed as to the definition of "judgment" under NRS Chapter 485. Ms. Simmons contended that "judgment" meant any judgment connected to a motor vehicle accident, including attorney's fees and costs. Conversely, Mr. Briones argued that the plain language and structure of the statute demonstrated that judgments for attorney's fees and costs did not constitute judgments under NRS Chapter 485. He further argued that the purpose of the statutes was to incentivize uninsured drivers to pay for personal injury and property damages owed. Consequently, Mr. Briones maintained that the DMV did not have authority to suspend his driver's license because he was both an insured driver at the time of the accident, and the judgment against him was only for attorney's fees and costs.

The Nevada Supreme Court agreed with Mr. Briones, noting that Nevada courts should adopt the ordinary meaning of statutory language when the language was plain and unambiguous. The Court held that the purpose of the non-payment of judgment statutes was to ensure that uninsured motorists paid for damages resulting from their tortious acts involving motor vehicles.

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JUDGEMENTS

The Nevada Supreme Court Clarifies the Meaning of "Judgments" under the

Attorney's fees and costs awarded as a penalty under arbitration rules were not damages resulting from the negligent use of a motor vehicle. When examining NRS Chapter 485 holistically and taking its purpose in context, "judgments" did not include judgments that were exclusively for attorney's fees and costs. The DMV therefore erred in suspending Mr. Briones' driver's license.

The Nevada Supreme Court upheld the district court's decision and affirmed the denial of Ms. Simmons' petition for judicial review. *Simmons v. Briones*, 133 Nev. Adv. Op. 9 (Mar. 2017)

NEVADA JURY VERDICTS

PERSONAL INJURY

Jury Awards Plaintiff Compensatory Damages Equal to One Fourth of Plaintiff's Pretrial Demand

Defendant, a 55-year-old accountant, rear-ended Plaintiff, an unemployed 40-year-old woman. Defendant admitted negligence, but argued that the accident did not cause Plaintiff's injuries.

As a result of the accident, Plaintiff allegedly suffered herniated cervical and lumbar disks, which required surgery, and residual pain. At trial, Plaintiff called an orthopedic physician who opined that the injuries Plaintiff sustained in the accident required surgical intervention and that Plaintiff would suffer from permanent residual pain. Defendant relied on the testimony of an orthopedic physician who opined that Plaintiff suffered from an ongoing degenerative condition that caused Plaintiff's herniated disks and need for surgical intervention.

Plaintiff sought \$400,000.00 in medical expenses and \$800,000.00 in lost household services. Plaintiff made a pretrial demand of \$100,000.00, and Defendant served a \$20,000.00 Offer of Judgment. During closing arguments, Plaintiff requested \$400,000.00 in past

medical expenses, \$800,000.00 for lost household services and lost enjoyment of life, and \$300,000.00 for pain and suffering. Defendant argued \$14,500.00 for medical expenses and \$5,000.00 to \$10,000.00 for pain and suffering was sufficient compensation.

After a seven-day trial and one hour of deliberation, the jury awarded Plaintiff \$25,000.00 in compensatory damages. *Daichendt v. Chen*, September 2, 2016.

Bicyclist Recovers No Damages After Struck by Defendant's Car

Plaintiff, a male Nevada resident, was riding his BMX bicycle on a sidewalk that ran parallel to the travel lanes of Eastern Avenue. Plaintiff contended that Defendant, a female Nevada resident driving a 2004 Dodge Durango, failed to yield the right-of-way when making a right turn onto Eastern Avenue. Defendant denied liability arguing that Plaintiff negligently laid down his bicycle in the crosswalk when she turned. Plaintiff suffered unspecified injuries as a result of the incident.

Plaintiff sought \$64,110.00 in medical expenses, but served a pre-trial settlement demand for \$50,000.00. Defendant offered \$20,000.00. The matter was tried in the Short Trial Program with four jurors deliberating by stipulation. The jurors deliberated for two hours and unanimously returned a verdict for Defendant. *Evans v. Turba*, September 23, 2016.

Jury Finds Taxicab Company and Taxicab Driver Both Liable for Motor Vehicle Accident

Plaintiff, a casino maintenance worker, and Defendant, a taxicab driver acting within the course and scope of his employment, were traveling eastbound on Tropicana Avenue in Las Vegas. Defendant rear-ended Plaintiff after Plaintiff slowed and moved towards the right lane to allow an emergency vehicle to pass. The jury was permitted to view dash-camera video of the collision.

As a result of the accident, Plaintiff allegedly suffered thoracic, cervical, and lumbar spinal injuries. Plaintiff further claimed that he suffered from bulging cervical disks that required epidural injections. Defendant contended that Plaintiff's injuries were related to a preexisting condition.

Plaintiff served a \$65,000.00 Offer of Judgment and Defendants countered with a \$50,000.00 settlement offer. During closing arguments, Plaintiff's counsel asserted that the cervical injuries were permanent, whereas Defendants' counsel argued that the collision was minor and unavoidable. The trial lasted three days. After three hours of deliberation the jury, in a unanimous decision, awarded Plaintiff \$52,000.00 for past pain and suffering and \$52,000.00 for future pain and suffering. *Enblom v. Vegas-Western Cab, Inc. and Abubeker*, August 31, 2016.

Defendant and Third-Party Defendant Equally at Fault for Traffic Circle Accident

Plaintiff, a female Nevada Resident, was a passenger in a vehicle driven by Third-Party Defendant McKenzie. While driving in a traffic circle on Town Center Drive in Las Vegas, Defendant Brecheisen, an employee of Defendant Sun City Summerlin Florist acting within the course and scope of his employment, struck Plaintiff's vehicle.

The parties disputed liability. Plaintiff and Third-Party Defendant McKenzie argued that Defendant Brecheisen caused the accident by making an unsafe turn. Defendants denied liability and contended that Third-Party Defendant McKenzie actually caused the collision.

As a result of the collision, Plaintiff allegedly suffered lumbar soft tissue injuries and sought \$4,490.00 in medical expenses. The case was tried in Nevada's Short Trial Program and the parties stipulated to a four-person jury. After the one-day trial, the jury found Defendant Brecheisen and Third Party Defendant McKenzie each 50 percent at fault. The jury awarded Plaintiff \$29,100.00 in compensatory damages, including \$24,100.00 in past medical expenses

and \$5,000.00 in past pain and suffering. *Gasiewicz v. Sun City Summerlin Florist*, September 9, 2016

Defendant Liable for Rear-Ending Plaintiff who Stopped for an Emergency Vehicle

Plaintiff, a female Nevada resident, was driving southbound on Rancho Drive in Las Vegas in a 2011 Kia. Defendant, the driver of a 1994 Ford pick-up truck, rear-ended Plaintiff when she stopped for a passing emergency vehicle. Plaintiff's vehicle was considered a total loss as a result of the collision.

Plaintiff allegedly suffered thoracic and lumbar soft tissue injuries and cervical spine injuries as a result of the accident. Plaintiff required chiropractic treatment, physical therapy, epidural injections, and cervical discectomies and fusions. She also claimed that she would require future surgery at C4-5 at a cost of \$134,034.00 to \$165,845.00. Plaintiff sought \$210,498.76 in past medical expenses, and \$134,034.00 to \$165,845.00 in future medical expenses.

After a six-day trial and two hours of deliberation, the jury unanimously found in Plaintiff's favor and awarded \$979,380.58 in total compensatory damages. This total included \$210,498.76 in past medical expenses, \$177,031.82 in future medical expenses and \$405,600.00 in future pain and suffering. *Green v. Reiger*, September 16, 2016.

MEDICAL MALPRACTICE

Defendants Not Liable for Death of Patient After Bowel Obstruction Surgery

Plaintiff, the estate of Decedent retiree, sued Defendants, a medical school and colorectal surgeons, for wrongful death. According to Plaintiff, Defendant surgeons fell below the required standard of care and acted negligently when they failed to re-operate on Decedent's bowel obstruction. This failure allegedly caused a perforation that led to Decedent's death.

Defendants maintained that Decedent's death was the result of her own failure to follow the Defendants' instructions to return to Defendant hospital if she experienced post-operative complications. Defendants maintained that they did not fall below the standard of care, and relied on the expert testimony of a colorectal surgeon and an oncological surgeon.

Plaintiff served a \$225,000.00 pretrial Offer of Judgment; Defendants did not make a settlement offer. During closing arguments, Plaintiff maintained that Defendants' negligence led to Decedent's death and Defendants continued to deny liability. After a 14-day trial, the jury deliberated for two hours before returning a verdict for Defendants. *Estate of Simmons v. University of Nevada School of Medicine, et al.*, September 23, 2016.

Plaintiff Alleging a Negligent Failure to Diagnose an Aortic Dissection Fails to Recover in Medical Malpractice Action

Plaintiff was a Nevada Resident in his late sixties who owned a coin operated laundromat. Plaintiff went to Defendant Medical Center by ambulance on February 25, 2013, because of sudden jaw, chest, spinal, and head pain. A non-party emergency physician at Defendant Medical Center referred Plaintiff to Defendant Physicians who treated Plaintiff until he was discharged on February 26, 2013.

On March 1, 2013, Plaintiff went to Carson Tahoe Regional Healthcare Hospital complaining of palpitations and shortness of breath. The hospital found that Plaintiff exhibited atrial flutter with rapid ventricular response. Plaintiff also received an echocardiogram that indicated he had pericardial effusion and a dissection involving the ascending aorta. He later received a CT scan, which confirmed the dissection involving the ascending aorta. Thereafter, Plaintiff received an emergency repair to the aortic dissection.

Plaintiff argued that Defendants acted negligently and fell below the applicable standard of care when they failed to

diagnose his aortic dissection. Plaintiff asserted that he had to get his repair surgery, an iliac artery aneurysm repair, and a re-stitch of the initial repair because of Defendants' negligence in failing to diagnose his aortic dissection.

Defendants called an emergency medicine specialist, a cardiovascular disease specialist, and another physician with an unspecified specialty as expert witnesses. Plaintiff called a vocational rehabilitationist.

Plaintiff sought \$714,759.72 in medical expenses, \$151,000 in past lost wages, and \$157,000 in future lost wages. After a nine-day trial and over four hours of deliberation, the jury found for Defendants in a 6-2 verdict. *Cox v. Hometown Health Management Company dba Renown Regional Medical Center dba Renown Health Medical Group; Patel, M.D. and Kindig, M.D.*, May 20, 2016.

PREMISES LIABILITY

Defense Verdict After Death of a Man in an Apartment Fire

Plaintiffs were the parents and beneficiaries of the estate of their son, who was killed in a fire while visiting an apartment owned and managed by Defendants. Plaintiffs sued Defendants for wrongful death.

According to Plaintiffs, Defendants negligently maintained a refurbished refrigerator that overheated and caused the apartment fire that killed their son. Additionally, Plaintiffs asserted that Defendants negligently failed to maintain smoke detectors and fire alarms that would have warned their son about the fire. Plaintiffs' son allegedly inhaled a large amount of smoke and suffered from severe burns, and was trapped in the apartment during the fire.

Plaintiffs sought "just and reasonable" compensatory damages. After a six-day trial, the jury found that a candle caused the fire and returned a verdict for Defendants. *Michel and Granger v. Laskowski*, October 25, 2016.

Defendant Hotel Casino Created Hazardous Condition Involving Luggage Carts

Plaintiff, a visitor to Nevada, was walking with his wife inside Defendant's hotel and casino. An employee of Defendant was pushing a luggage cart and struck Plaintiff. Plaintiff contended that Defendant created a hazardous condition by negligently allowing its employees to operate luggage carts in a public area. Plaintiff further argued that Defendant should have warned its guests of this hazardous condition.

Defendant stipulated to liability, but argued that the accident was not the cause of Plaintiff's injuries. Plaintiff claimed cervical, thoracic, and lumber soft tissue injuries as the result of the accident. Plaintiff further alleged shoulder pain and a knee injury that required knee replacement surgery. Plaintiff relied on the deposition of his orthopedic physician to support his claim.

Plaintiff sought \$113,262.32 in medical expenses. The jury deliberated for more than five hours after a five-day trial and awarded Plaintiff \$48,500.00 in compensatory damages, including \$18,500.00 in past medical expenses, \$2,500.00 in past loss of enjoyment of life, and \$27,500.00 in past pain and suffering. *Dunn v. Ramparts, Inc. dba Luxor Hotel and Casino*, September 16, 2016.

Plaintiff Awarded \$300,000.00 After Tripping over Defendant's Tool Bag

Plaintiff, a casino card dealer acting in the scope of his employment, tripped and fell over a tool bag left by Defendant's employee in the walkway of a casino pit area. Defendant argued that its employee placed the tool bag in the area where he was working and Plaintiff negligently failed to look where he was walking.

Plaintiff fractured his arm because of the fall and claimed that he was unable to perform his regular job duties. Plaintiff sought \$300,000.00 in damages

and made a pre-trial settlement demand for that amount. Defendant offered \$25,000.00.

During the three-day trial, the jury was provided surveillance footage of the incident. The jury deliberated for over three hours before awarding Plaintiff \$300,000.00 in compensatory damages. *Joseph v. Shuffle Master International, Inc.*, October 27, 2016

BREACH OF CONTRACT

Law Firm Awarded \$73,348.09 for Client's Failure to Pay for Legal Services

Defendants hired Plaintiff law firm to handle several lawsuits and provide general legal services. The parties entered into standard engagement agreements and agreed that Plaintiff would be paid an hourly rate. Plaintiff represented Defendants from February 2012 to January 2013.

Defendants allegedly breached the contract by refusing to pay \$75,827.84 for legal services provided after December 2012. Defendants maintained that they were not required to pay the Plaintiff's fees because Plaintiff's legal services fell below the standard of care. After a four-day trial, and three hours of deliberation, the jury unanimously awarded Plaintiff \$73,348.09 in damages. *Gordon & Rees L.L.P. v. Royce International Broadcasting Corp., et al.* November 10, 2016

COMMENTS

Amendments to the Local Rules of Practice for the United States District Court for the District of Nevada

The United States District Court for the District of Nevada recently issued an order including a number of amendments to the local rules of civil practice. Many of these changes were intended to promote judicial efficiency, reduce court expenses, and to streamline interactions between the parties in civil litigation. The changes

were also intended to make the rules easier to understand and to harmonize style and terminology within the rules. Notable amendments to the local rules are highlighted below.

Parties in Nevada must now file all documents in a searchable PDF format according to amended Local Rule IA 10-1. Exhibits and attachments that cannot be converted into a searchable format may be submitted as scanned images. This amendment was intended to improve the court's ability to examine and navigate court documents more efficiently.

Additional certifications under Local Rule 21-1 are now required prior to trial. Parties must now certify that they considered alternative dispute resolution, including mediation, arbitration, and early neutral evaluation, if applicable. Parties must also certify that they considered consenting to trial through a magistrate judge or the Short Trial Program. Parties must further certify in their discovery plan whether they intend to present evidence in an electronic format that is compatible with the court's new electronic jury evidence display system.

The court also made changes to the meet-and-confer requirements under Local Rule IA 1-3(f). Meet-and-confer conferences in civil litigation must now be conducted in person, through telephone, or through video conference. Written communication between the parties is no longer sufficient to constitute a meet-and-confer conference. This meet-and-confer requirement is now similar to the requirements already in place in Nevada state courts. This change was intended to encourage communication between the parties.

Local Rule 81-1 was also introduced, which established new procedures for re-filing motions in removed actions. Under this rule, all motions and other requests that were pending in state court will be automatically denied without prejudice upon removal to federal court, but may be subsequently re-filed. This new rule was intended to ensure compatibility and compliance with the Federal Court's electronic case management and filing system.



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