Alverson Taylor Mortensen & Sanders
Nevada's Law Firm

NEVADA
Legal Update

Fall 2017

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

Highlights

Plaintiffs May Not Seek Recovery Against Member-Limited Liability Companies Unless the Member Limited Liability Companies are Personally Negligent

The Nevada Supreme held that Member-LCCs were protected from a negligence-based tort lawsuit against another LLC pursuant to NRS 86.371 and NRS 86.381. Member-LLCs are not proper parties unless they are personally negligent.

Defense Verdict After Table Flips at Association's Annual Meeting

Plaintiff claimed a table flipped over during an association meeting causing him to sustain injuries. Defendant relied on the testimony of an expert mechanical engineer and neurosurgeon to refute Plaintiff's claims. The jury returned a verdict in favor of Defendant.

Assembly Bill 207 Changes the Jury Selection Process

Assembly Bill 207 broadened the pool of potential jurors in Nevada by including individuals identified by the Employment Security Division of the Department of Employment, Training, and Rehabilitation and the public utility.

Nevada Supreme Court Decisions

Corporate Liability

Member-Limited Liability Companies are Protected from Negligent-based Tort Actions Filed Against Another Limited Liability Company Unless the Member-LLC is Personally Negligent

Plaintiffs Peter and Christian Gardner filed a lawsuit against Henderson Water Park, LLC, doing business as Cowabunga Bay Water Park, after their son suffered severe injuries as a result of nearly drowning in the wave pool. Plaintiffs also filed suit against two managing partners of Cowabunga Bay: West Coast Water Parks, LLC and Double Ott Water Holdings, LLC (member-LLCs). Plaintiffs alleged that the negligence of Cowabunga Bay and the member-LLCs contributed to their son's injuries as Cowabunga Bay failed to adequately staff lifeguards.

The member-LLCs moved for summary judgment arguing they were improper parties pursuant to NRS 86.381, which stated that "[a] member of a limited-liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company." The trial court granted summary judgment and Plaintiffs appealed, arguing that their lawsuit was a direct claim against the member-LLCs for their own tortious conduct in negligently operating Cowabunga Bay.

The Nevada Supreme Court disagreed with Plaintiffs, holding that pursuant to NRS 86.371 and 86.381, a member-LLC cannot be personally responsible for the primary LLC's liabilities based solely on its membership in the LLC. NRS 86.371 states that "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for debts or liabilities of the company."

The Nevada Supreme Court admitted that NRS 86.371 and NRS 86.381 do not shield the member-LLCs from liability for personal negligence; however, the Court found that Plaintiffs failed to establish that the conduct of the member-LLCs was separate and apart from the alleged conduct of Cowabunga Bay. Plaintiffs further failed to specify any individual act or omission by the member-LLCs that contributed to their child's alleged injuries.

The Nevada Supreme Court ultimately held that pursuant to NRS 86.371 and NRS 86.382, the member-LLCs were not proper parties. Plaintiffs did not claim that the member-LLCs breached a personal duty owed to their son, but simply alleged that

In This Issue

the member-LLCs breached certain duties that only arose by their role as a member-LLC. As such, the Nevada Supreme Court upheld the district court's decision granting summary judgment. *Gardner v. Henderson Water Park, LLC, d/b/a Cowabunga Bay Water, LLC, et. al.*, 133 Nev. Adv. Op. 54 (August 2017).

Civil Procedure

Plaintiffs are Required to Produce a Computation of Alleged Future Damages Prior to Trial Pursuant to NRCP 16.1(a)(1)(C)

Plaintiffs Christian Cervantes-Lopez and Maria Avarca allegedly sustained injuries as a result of a motor vehicle accident with Defendant Mariam Pizarro-Ortega. Plaintiffs received various medical treatment for their injuries and subsequently filed a negligence action against Defendant. Plaintiff Cervantes-Lopez was referred to a neurosurgeon, Dr. Stuart Kaplan, who opined that Plaintiff required future lumbar fusion surgery at L5-S1. This surgical recommendation was included in Plaintiff Cervantez-Lopez's medical records.

Plaintiffs produced a computation of damages and Plaintiff Cervantes-Lopez's medical records, including the records from Dr. Kaplan, in their initial disclosures. Plaintiffs failed, however, to produce a computation of damages before trial that included a cost computation for Plaintiff Cervantes-Lopez's future lumbar fusion surgery, as required by Rule 16.1 of the Nevada Rules of Civil Procedure. Defendant therefore filed a motion in limine seeking to exclude evidence of Plaintiff Cervantes-Lopez's future medical expenses arguing that Plaintiff's failure to disclose a computation of damages prohibited Plaintiff Cervantez-Lopez from seeking them at trial.

The district court relied on the Nevada Supreme Court case, *FCH1, LLC v. Rodriguez*, 130 Nev., Adv. Op. 46, 355 P.3d 183, 189-90 (2014). In FCH1, the Court held that a plaintiff's treating physicians were not required to produce expert reports under NRCP 16.1(a)(2)(B) and could testify regarding any opinions they formed during the course of treating the plaintiff so long as all documents supporting those opinions were disclosed to the defendant. Id. The district court therefore denied Defendant's motion arguing that Plaintiffs disclosed all of Plaintiff Cervantes-Lopez's medical records from the neurosurgeon who would be performing the lumbar fusion surgery. The trial court held that since the medical records with the surgical recommendation were disclosed, Plaintiffs were not required to provide a cost computation for the future surgery.

Plaintiffs produced a cost computation for the future lumbar fusion one day prior to Dr. Kaplan's trial testimony. Dr. Kaplan then testified that the surgery would cost $224,100.00. Defendant's expert, Dr. Derek Duke, opined that the projected cost was high and that these surgeries generally cost $120,000.00. The jury ultimately awarded Plaintiff Cervantes-Lopez $499,000.00 in damages, including $200,000.00 for future medical expenses. Defendant subsequently filed a motion for new trial arguing that, among other things, the district court committed reversible error in permitting Plaintiffs to introduce evidence of Plaintiff Cervantes-Lopez's future medical expenses as he did not provide the required computation of damages. The district court denied Defendant's motion and the issue was appealed to the Nevada Supreme Court.

Pursuant to NRCP 16.1(a)(1)(C), a party is required to produce, "without awaiting a discovery request…[a] computation of any category of damages claimed." Defendant argued that future damages were in fact considered "category of damages" and as such Plaintiffs were required to produce the cost computation of the future lumbar fusion surgery. Plaintiffs argued that there was a general understanding in Nevada that there were no requirements to produce cost computation for future medical expenses based on FCH1.

The Nevada Supreme Court held that FCH1 did not apply to a computation of damages, but instead addressed treating physicians' expert opinions and testimony. The Court disagreed that there was a general understanding that Plaintiffs were not required to produce cost computations for future damages. Rather, Plaintiffs were required to produce a cost computation of future medical expenses even if the amount was not precise as long as it was based on available information.

The Court further noted that if a party fails to comply with NRCP 16.1 requirements, NRCP 37(c)(1) provides that any party cannot use that evidence at trial unless the party can show "substantial justification" for the failure to disclose the evidence or "unless such failure is harmless." The Court held that Plaintiffs failed to disclose the cost computation for the future lumbar surgery pursuant to NRCP 16.1 without evidence of substantial justification, and as such, the evidence should have been excluded at trial.

Despite these findings, the Court did not believe Defendant was entitled to a new trial as the district court's error did not "materially affect the substantial rights of [the] aggrieved party" pursuant to NRCP 59(a). Defendant's medical expert had the opportunity and did in fact opine regarding Dr. Kaplan's estimate for the lumbar

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fusion surgery and testified to the amount he believed to be reasonable. Defendant never established that Dr. Duke would have provided more convincing testimony if he had more time to review the future cost estimate. The Court found that Dr. Duke should have been familiar with this surgery as he performed that same surgery as a practicing physician and as a former partner of Dr. Kaplan. Additionally, the jury arguably took Dr. Duke's opinions into account as they awarded Plaintiff Cervantes-Lopez $200,000.00 in future medical expenses, an amount less than Dr. Kaplan's estimate.

The Nevada Supreme Court additionally held that Defendant's substantial rights were not materially affected by the district court's exclusion of Defendant's billing expert, Plaintiffs' counsel's alleged improper closing arguments, and the court's exclusion of medical lien evidence. The Court held that Defendant's medical expert, Dr. Duke, was permitted to read the report of the excluded billing expert and offer testimony regarding the reasonableness of the medical expenses.

The Court additionally found that although Plaintiff's attorney asked the jury to send a message to Defendant through its verdict by saying, "[V]erdicts shape how people follow the rules," the attorney did not ask the jury to ignore the evidence, as he followed that sentence with "I submit to you the evidence in this case." Because Plaintiff's counsel did not dismiss the evidence, the argument did not amount to an improper Golden Rule argument under *Lioce v. Cohen*, 124 Nev. 1, 20-23, 174 P.3d 970, 982,84 (2008) and *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 368-69, 212 P.3d 1068, 1082 (2009). According to the Court, an improper Golden Rule argument is one that asks the jury to place themselves in a plaintiff's position or asks the jury to send a message to the defendant instead of evaluating the evidence.

Defendant also argued that Plaintiffs' medical liens were relevant to show Plaintiffs' treating providers were biased as a large verdict would guarantee their payment. The Court held that the district court's exclusion of medical liens was not improper as the liens' degree of relevance was limited according to *Khoury v. Seastrand*, 132 Nev., Adv. Op. 52, 377 P.3d 81, 94 (2016). The probative value of the liens to demonstrate bias was substantially outweighed by its potential to show a motivation to lie. As such, Defendant's motion for new trial was denied. *Pizarro-Ortega v. Cervantes-Lopez and Avarca*, 133 Nev. Adv. Op. 37 (June 2017).

NEVADA JURY VERDICTS

Personal Injury

Jury Finds for Defendant After Table Flips Over at Association Meeting

Plaintiff, a 74 year-old retired male, alleged he sustained injuries to his lumbar spine after a table he was sitting at during Defendant's annual meeting tipped, causing him to fall. Plaintiff relied on the testimony of an orthopedic physician and a physiatrist, who opined that Plaintiff would require radiofrequency ablation for life.

Defendant denied liability and argued: 1) the table flipped as a result of a person standing up from the other end of the table; 2) the picnic table was provided by a high school 12 to 15 years prior; 3) the table was stable, located on a flat surface, and was not required to be anchored to the ground; and 4) there were no prior issues with the table. Defendant retained a mechanical engineer, who testified that the table flipped due to an uneven distribution of weight and Defendant was not required to anchor the table as it was on a flat surface. Defendant also relied on the testimony of a neurosurgeon, who opined that Plaintiff's lumbar compression fracture resolved after kyphoplasty surgery and Plaintiff experienced significant pre-existing lumbar pain.

During closing arguments, Plaintiff's counsel argued that Defendant should have known the table was defective and Plaintiff's activity was limited due to his pain. Defendant's counsel argued that the table was not dangerous and continued to deny liability.

Prior to trial, Plaintiff demanded $1,800,000.00 and Defendant countered a $75,000.00 offer. At the time of trial, Plaintiff sought $105,000.00 in past medical expenses. After a four- day trial and one hour of deliberation, the jury found for Defendant. *Brown v. Spring Creek Association*, May 5, 2017.

Maintenance Worker Awarded $5,142.00 for Past Medical Expenses After Motor Vehicle Accident

Plaintiff, a male maintenance worker, alleged that Defendant, a 24 year-old make-up artist, negligently caused a motor vehicle accident, which resulted in injuries to Plaintiff. Plaintiff relied on an expert medical report prepared by his treating chiropractor, who opined that Plaintiff's complaints were causally related. The physician was, however, unable to opine regarding Plaintiff's claimed headaches.

Defendant's expert chiropractor opined that Plaintiff's headaches were unrelated to the motor vehicle accident and Plaintiff sustained a minor soft tissue injury, which did not necessitate a cervical spine MRI.

Plaintiff was previously awarded $11,317.00 as part of Nevada's arbitration program. On appeal of the arbitration decision and a one-day short-trial, Plaintiff sought $5,142.00 in past medical expenses. Defendant offered Plaintiff $6,500.00 prior to trial. After a one-day trial, four jurors found for Plaintiff unanimously and awarded $5,800.00 in compensatory damages. *Echeverria v. Gurtner*, May 26, 2017.

Jury Awards $110,000.00 against Defendant Who Executed Illegal U-Turn

Plaintiff, a realtor, alleged Defendant, a male working in the course and scope of his employment for Defendant Western

Cab Company, negligently executed an illegal U-turn causing a collision. Defendants admitted negligence, but maintained that Plaintiff's injuries were not causally related to the motor vehicle accident.

As a result of the collision, Plaintiff allegedly sustained a traumatic kidney injury. Defendant relied on the videotaped deposition testimony of a urology expert, who opined that Plaintiff's lack of symptoms five days after the accident and his condition when the symptoms first arose indicated that Plaintiff had passed a kidney stone. He further opined that the kidney stones caused minor bleeding and blood clots.

Plaintiff sought compensatory damages, including an unspecified amount for past medical expenses. Plaintiff made a pre-trial demand of $50,000.00 and Defendant offered $30,000.00. After a four-day trial and approximately four hours of deliberation, the jury found for Plaintiff and awarded him $110,000.00 in compensatory damages. *Dahl v. Western Cab Company and Teclemicael*, April 14, 2017

Medical Malpractice

Physician 75 Percent at Fault for Plaintiff's Death Following Gallbladder Removal

Decedent was air-lifted from non-party Kingman Regional Medical Center to non-party Sunrise Hospital on May 17, 2012, with complaints of abdominal pain, nausea, and vomiting. Decedent was diagnosed with gallbladder pancreatitis and a CT scan of his abdomen revealed a swollen pancreas with extensive peripancreatic inflammatory changes around his duodenum and along his colon with fluid in the left paracolic gutter and fluid in the omentum. There were stones in the gallbladder with mild amounts of periphaptic ascites.

On May 19, 2012, non-party physicians requested a surgical consult with Defendant who diagnosed Decedent with abdominal pain, cholecystitis, cholelithiasis, and leukocytosis with infected gallbladder. Defendant performed a gallbladder removal with intraoperative cholangiogram and no complications were noted. Decedent was discharged on May 22, 2012.

On May 29, 2012, Decedent again presented to Kingman Medical Center with unrelieved abdominal pain and nausea, fever, fatigue, and abdominal distension, low white blood count, low calcium and albumin, elevated AST, elevated lipase and amylase, and worsened pancreatic edema consistent with pancreatic necrosis. Decedent was transferred to Sunrise Hospital again on May 30, 2012 with a diagnosis of pancreatitis, leukocytosis, and polycythemia, with CT scan findings consistent with pancreatic necrosis. Defendant ordered a PICC line and transferred Decedent to Kindred Hospital where he died from shock with systemic acidosis, possible ascending cholangitis, acute pancreatitis, and severe anemia. The autopsy also revealed five liters of extensive fecal matter in the peritoneal cavity due to a one-half inch defect in the anterior aspect of the small bowel near the transverse colon. Pancreatitis with retroperitoneal hemorrhage was also found.

Decedent, age 69, was survived by his spouse and his children who brought a wrongful death suit against Defendant, a female general surgeon. Plaintiffs alleged that Defendant fell below the standard of care when she negligently perforated Decedent's bowel during the gallbladder removal surgery. As a result of Defendant's negligence, Decedent allegedly suffered peritonitis with other contributing conditions, which included hemorrhagic gallstone pancreatitis. Defendant denied falling below the standard of care.

After a ten-day trial the jury awarded Decedent's spouse $600,000.00 in compensatory damages, which included $200,000.00 for past pain and suffering, $300,000.00 for future pain and suffering, and $100,000.00 for Decedent's pain and suffering. Decedent's estate was awarded $139,000.00 for Decedent's medical expenses. The jury additionally found that Defendant was 75 percent liable while the non-party healthcare providers were 25 percent at fault. Decedent's spouse therefore recovered $450,000.00 and his estate recovered $104,250.00. *Miller and Estate of Miller v. Blanco-Cuevas, M.D.*, February 3, 2017.

Jury Finds in Favor of Defendant Who Used Radiation to Treat Plaintiff's Rectal Cancer

Plaintiff, a 53 year-old male Nevada resident, employed as a plant engineer, alleged that Defendant radiation oncologist fell below the standard of care when he administered excess radiation to treat Plaintiff's rectal cancer. As a result of the excess radiation, Plaintiff allegedly suffered significant nausea, vomiting, abdominal pain, pelvic infection, and anastomotic leaks.

At trial, Plaintiff relied on the testimony of a radiation oncologist who opined that Plaintiff's cancer was a clinical stage T1/T2, node negative with no metastasis, and the standard of care for clinical T1 or T2 rectal adenocarcinoma was surgery alone. Additionally, radiation of 66 Gy exceeded the standard of care for even stage T3 or T4 and was unreasonable. Plaintiff also relied on the opinions and testimony of a diagnostic radiologist. Defendant denied falling below the standard of care and relied on the trial testimony of an oncologist, who testified via telephone conference.

Plaintiff sought compensatory and punitive damages, including an unspecified amount for medical expenses, lost wages, and impaired earning capacity. Plaintiff's wife sought damages for loss of consortium. After a nine-day trial and two days of deliberation, the jury unanimously found for Defendant. *Mitchell v. Sharda, et al.*, February 22, 2017.

Gynecologist Did Not Fall Below the Standard of Care during Laparoscopic Hysterectomy

Plaintiff, a 53 year-old Nevada resident employed as a human resources specialist, alleged that Defendant gynecologist fell below the standard of care during

a laparoscopic hysterectomy and that Defendant negligently punctured Plaintiff's bladder and burned her ureters. Plaintiff's expert gynecologist opined that Defendant was negligent and did not obtain Plaintiff's informed consent before performing the procedure. Defendant argued complications were known risks of surgery and maintained that he met the standard of care.

After a five-day trial and approximately four hours of deliberation, the jury returned a verdict for Defendant. *Roukie v. Alpine Women's Health, et al.*, March 10, 2017.

Breach of Contract

Former Employee Wins Breach of Contract Action after Receiving No Compensation for Work Performed

Plaintiff, a female natural health educator, was employed by Defendant Snee for three and one-half years to design a website and contact alternative care physicians to introduce them to Defendant business' products. Plaintiff alleged that Defendant Snee repeatedly assured Plaintiff that the ownership of Defendant business would be willed to her. She also alleged that she provided labor for Defendant business, working six to seven days per week, in addition to managing Defendant Snee's personal airplanes and recreational vehicles, without compensation except minimal amounts for housing and expenses.

Plaintiff also alleged that she provided Defendant Snee with pain management for his brain atrophy through Reiki Therapy five days per week without compensation, and that Defendant Snee, Defendant Snee's son, and Defendant Snee's girlfriend breached their contract by failing to pay Plaintiff's rent in August 2013, failing to repair her vehicle while Defendant Snee was the lien holder, and failing to deposit funds into the debit card account Plaintiff was instructed to use to cover expenses. Plaintiff also alleged that Defendant Snee insisted Plaintiff sign and use Defendant business' debit card with Plaintiff's name to pay for advertising and failed to pay for them.

Defendant argued Plaintiff was provided residential arrangements and a vehicle at Defendant business' cost and was also provided income on a debit card, which he believed was a reasonable compensation for Plaintiff's efforts. Defendant also argued that Plaintiff's efforts were requested in connection with work and any personal services were performed without any agreement for compensation. Defendants alleged that after Plaintiff's termination, she retained possession of company inventory and Defendant Snee's personal assets without authorization.

Plaintiff alleged that as a result of Defendants' actions, she suffered financial harm, stress, anxiety, sleeplessness, diminished credit rating, increased cost of credit and rates of interest, cancellation of open trade lines of consumer credit, mental anguish, slander, and damaged reputation and health. Plaintiff sought compensatory and punitive damages. After a three-day trial, and two hours of deliberation, the jury found unanimously for Plaintiff and awarded her $3,000.00 compensatory damages against Defendant Snee, $5,000.00 compensatory damages against Defendant Snee's son, and $12,000.00 compensatory damages against Defendant business. *Aiken v. Snee, et. al.*, February 9, 2017.

Defendants Breached a Land Lease Contract and Guaranty, While Plaintiffs Interfered with Defendants' Prospective Economic Advantage

Plaintiffs alleged that Defendants breached a land lease contract and guaranty when they failed to pay rent and left the leased premises before the date agreed to by the parties. Defendants denied liability arguing they had entered into a purchase agreement with a third party to sell the building on the land subject to the land lease contract and Plaintiffs were aware of this agreement.

Defendants alleged that Plaintiffs breached the covenant of good faith and fair dealing when they sought to increase rent and obtain other unreasonable concessions from Defendants. As such, Defendants countersued for breach of good faith and fair dealing and intentional interference with contractual relations and perspective economic advantage. Plaintiffs sought $255,467.22 in contractual damages plus costs and attorney's fees. After a nine-day trial and two hours of deliberations, the jury awarded Plaintiff $132,278.43 in compensatory damages for breach of contract and guaranty and awarded Defendants $400,000.00 on their counterclaim for interference with prospective economic advantage. *Weingarten Nostat, Inc. v. Mr. "D", LLC and Dyke v. Weingarten Nostat*, Inc., February14, 2017

Premises Liability

Plaintiff Awarded $56,000.00 after Tripping on Raised Concrete at Apartment Complex

Plaintiff, a male Nevada resident, alleged that Defendants, apartment complex and property management company, were negligent in their maintenance of the property after he tripped and fell over a portion of raised concrete in the common area of the complex. Plaintiff also alleged that Defendants knew or should have known of the dangerous condition and failed to warn and eliminate the condition. Plaintiff relied on the expert testimony of a civil engineer to address liability, and the testimony of a neurosurgeon who opined that Plaintiff sustained cervical, thoracic, and lumbar soft tissue injuries and injuries to her shoulders. Defendants presented the videotaped deposition of an expert orthopedic physician.

Plaintiff sought compensatory damages, including unspecified medical expenses. After an eight-day trial and two days of deliberation, the jury awarded Plaintiff $80,000.00 in compensatory damages. The jury found Plaintiff to be 30 percent at fault and Plaintiff's award was therefore reduced to $56,000.00. *Sirigos v. NGVP, LLC dba Pacific Islands in Green Valley and ICAFS, Inc. dba General Services Corporation*, January 19, 2017.

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Comments

Assembly Bill 207 Increases the Pool of Potential Jurors

Assembly Bill 207 was signed by Governor Brian Sandoval on June 12, 2017 and became effective on July 1, 2017. Assembly Bill 207 broadens the jury pool by requiring the Jury Commissioner in each jurisdiction or county to compile and maintain a list of qualified electors from a list of persons registered to vote, a list of drivers registered in the county, and a list of customers of the public utility. This bill also requires the Employment Security Division of the Department of Employment, Training, and Rehabilitation (DETR) to provide a list of those drawing benefits from DETR to the Jury Commissioner. The Employment Security Division of DETR provides job placement and training to Nevada businesses and has various programs including career counseling, veterans' services, and employee/employer services. By adding those who draw benefits from the Employment Security Division to the pool of potential jurors, there will be a larger and more diverse number of people who will be eligible to serve on juries.

The Jury Commissioner is required to maintain a record of the name, occupation, address, and race of each eligible juror selected through the list. The Jury Commissioner is also required to include statistics from the records and submit the list at least once per year. While most courts rely on the self-reporting of jurors to identify their name, occupation, address, and race, requiring the Jury Commissioner to maintain a list will give a more accurate representation of the makeup of the jury pool and has the potential to streamline the jury selection process.

This bill also provides that if someone is found to be using the information collected by the Jury Commissioner for purposes other than those authorized by law, or there is a failure to protect or prevent unauthorized use or dissemination, that person is guilty of a gross misdemeanor. This language was added into the bill and proposed by DETR in order to ensure that sensitive employment information was not disclosed in the process of identifying potential jurors.

Bruce Alverson Earns Rank of Diplomate with ABOTA

We are proud to announce that Bruce Alverson, senior and managing partner at Alverson, Taylor, Mortensen & Sanders, was recently elevated by the American Board of Trial Advocates (ABOTA) to its highest rank of Diplomate, based upon the achievement of 100 or more jury verdicts. ABOTA is one of the country's most distinguished trial lawyer associations. Membership is by invitation only and is based upon actual jury trial experience. Nationally, ABOTA has a total of 7,500 members and only 211 have been elevated to the rank of Diplomate