Alverson Taylor Mortensen & Sanders
Nevada's Law Firm

NEVADA
Legal Update

Spring 2018

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

Highlights

Nevada Supreme Court Upholds Affidavit Requirement for Claim Involving Foreign Body

NRS Chapter 41A, which addressed medical malpractice actions, required that an expert affidavit be filed with the initial Complaint. An incarcerated plaintiff alleged that this requirement violated his equal protection rights and deprived him of due process. The Court found that the affidavit requirement was rationally related to managing medical malpractice claims and medical insurance issues in Nevada.

Jury Unanimously Finds in Favor of Metropolitan Police on Motor Vehicle Negligence Claim

An incarcerated plaintiff was being transported by an officer with the Las Vegas Metropolitan Police Department. The officer allegedly drove the right rear tire of the transport van over a curb, resulting in a shoulder injury to the plaintiff. The jury unanimously decided in favor of the defendants.

Amputated Finger Results in $370,203.24 Verdict

Defendant physician reportedly told Plaintiff that she had a better chance of being struck by lightning than having finger cancer. Plaintiff allegedly required an amputation anyway due to a tourniquet placed by Defendant during a surgical biopsy. Plaintiff was ultimately awarded damages totaling $370,203.24.

Nevada Supreme Court Decisions

Medical Malpractice

Court Upholds Affidavit Requirement in Medical Malpractice Suits

Plaintiff Frank Milford Peck filed a lawsuit for medical malpractice against Defendants David Zipf M.D. and Michael D. Barnum M.D. Mr. Peck was an inmate at High Desert State Prison in Indian Springs, Nevada. In December 2013, Peck was admitted to Valley Hospital under Defendants' care. Plaintiff claimed that after his release from the hospital, he discovered that one of the physicians left a needle under the skin of his left hand.

Pursuant to NRS 41A.071, the district court shall dismiss a medical malpractice action without prejudice if the action was filed without an affidavit that: (1) supports the allegations contained in the action; (2) is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence; (3) identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and (4) sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms. Under NRS 41A.100, however, the affidavit was not required where evidence was provided that the healthcare provider caused the injury by unintentionally leaving a foreign substance within the body of a patient following surgery.

In his complaint, Plaintiff cited NRS 41A.100(1) and *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992), which recognized that expert testimony may not be necessary in medical malpractice cases where the alleged wrongdoing was a "matter of common knowledge of laymen." Plaintiff referenced the *res ipsa loquitur* doctrine, but did not claim that he had "surgery" under the statute. Defendants moved to dismiss and the district court granted their motion, concluding that Plaintiff's complaint did not meet the requirements of NRS 41A.100(l)(a), and thus, his failure to attach an affidavit of a medical expert to his complaint under NRS 41A.071 was fatal to his medical malpractice claim.

On appeal to the Nevada Supreme Court, Plaintiff argued that the district court erred in dismissing his complaint for lack of affidavit because his complaint did not require an affidavit under NRS 41A.100(1)(a). Plaintiff further argued that even if he did not meet the requirements for the statutory exception, his claim fell under the common knowledge *res ipsa loquitur* doctrine.

Defendants argued that the specific statute referred to an "object left inside the body following surgery" and therefore did not cover an insertion

In This Issue

of an IV needle which was not an "operative measure." Thus, Plaintiff's malpractice claim did not fall under the exception and a medical expert's affidavit in support of Plaintiff's claim was required. *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794.

Plaintiff further argued that the affidavit requirement in NRS 41A.071 violated his equal protection rights and deprived him of due process. In response to the Constitutional argument, the Court held that the statute should be presumed valid and Plaintiff bore the burden of establishing that the statute was unconstitutional. The Court further noted that, "when the law does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest." *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

A prior version of NRS Chapter 41A required that medical malpractice complaints be first heard by a screening panel before being filed in the district court. The panel's findings were admissible in the district court proceedings. *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1023, 102 P.3d 600, 602 (2004). This was meant to minimize frivolous lawsuits against doctors, to encourage settlement, and to lower the cost of malpractice premiums and healthcare. *Id.* at 1508, 908 P.2d at 697 (internal quotations omitted). Ultimately, this process was replaced by NRS 41A.071, the medical expert affidavit requirement. *Borger*, 120 Nev. at 1026, 102 P.3d at 604. The Nevada Supreme Court found that the affidavit requirement was rationally related to managing medical malpractice claims and medical insurance issues in Nevada. *Zohar*, 130 Nev., Adv. Op. 74, 334 P.3d at 405.

The Nevada Supreme Court affirmed the district court's order granting Defendants' motion to dismiss because Plaintiff failed to include a medical expert affidavit with his medical malpractice complaint. Defendants were represented by Alverson Taylor Mortensen & Sanders.

Peck v. Valley Hosp. Med. Ctr., 133 Nev. Adv. Op. 108 (December 2017)

Negligence

Nevada Supreme Court Overturns Verdict against Clark County School District Based on Lack of Evidence as to Proximate Cause

In 2004, Plaintiff Makani Kai Payo was an 11-year old student attending C.W. Woodbury Middle School, a school within Defendant Clark County School District (CCSD). While participating in a floor hockey game as part of his mandatory physical education class, another student unintentionally struck Plaintiff's eye with his hockey stick. As a result of the accident, Plaintiff required medical care, including eye surgery.

On September 21, 2012, Plaintiff, as an adult, filed a complaint against CCSD alleging negligence, negligent infliction of emotional distress, negligence per se, and negligent supervision. CCSD moved to dismiss the complaint, arguing among other things that Plaintiff's negligence claims were barred by the implied assumption of risk doctrine. Before trial, CCSD further argued that it was also entitled to discretionary immunity with regard to the decision to adopt floor hockey as a part of the P.E. curriculum and with regard to the decision to not provide safety equipment. The district court rejected the discretionary immunity argument and allowed Plaintiff to proceed on his claims. The jury returned a verdict in favor of Plaintiff and CCSD appealed to the Nevada Supreme Court.

The Nevada Supreme Court first analyzed CCSD's argument that Plaintiff was precluded from recovery under the implied assumption of risk doctrine. Implied assumption of risk requires "(1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed." *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 71, 358 P.2d 892, 894 (1961). The Court noted that physical education was mandated by the legislature under NRS 389.018(3)(d) and therefore Plaintiff was required to participate in physical education class. Because Plaintiff did not "voluntarily expose" himself to danger, as required by the implied assumption of risk doctrine, the first requirement was not satisfied and the doctrine was not applicable. The district court properly denied CCSD's motion for summary judgment as to assumption of risk.

The Court then addressed whether discretionary function immunity protected CCSD. In Nevada, a two-part test determined whether discretionary function immunity under NRS 41.032 applied to shield defendants from liability. *Martinez v. Maruszczak*, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007). Under the two-part test, a government defendant was not liable for an allegedly negligent decision if the decision (1) involved an element of individual judgment or choice, and (2) was based on considerations of social, economic, or political policy. Id.

The Nevada Supreme Court held that the "supervision of the floor hockey unit and decisions to (1) allow more players on the floor than indicated in the rules; (2) play with a different type of ball than set forth in the rules; and (3) supervise the class in the manner

Nevada Legal Update is published quarterly by

Alverson, Taylor, Mortensen & Sanders

6605 Grand Montecito Pkwy, Ste 200

Las Vegas, NV 89149

(702) 384-7000 | Fax (702) 385-7000

www.alversontaylor.com

Mr. Peterson (the gym coach/teacher) did, although discretionary, were not based on policy considerations to which immunity would typically apply." CCSD was liable for the coach's negligent supervision or instruction during the floor hockey class, and the district court properly determined that discretionary function immunity did not preclude Plaintiff from moving forward on this claim.

CCSD's decisions to add the floor hockey class to the curriculum and not provide safety equipment were, however, policy-based and discretionary, thus meeting both parts of the discretionary function test. Therefore, discretionary function immunity barred Plaintiff's arguments that CCSD was negligent in deciding to add a floor hockey unit to the P.E. curriculum and adopt rules that excluded safety equipment.

The Court also analyzed the issue of proximate cause. In a negligence case, as one of the essential elements, Plaintiff must show that Defendant was the proximate cause of his injuries, i.e. whether the event was sufficiently related to the injury and damages Plaintiff suffered. Although the jury found that CCSD was negligent, it was unclear how the jury reached that determination because the jury did not use a special verdict form.

Plaintiff's negligence claim was based on the type of ball used, the large number of players, and the alleged lack of instruction provided by Mr. Peterson. There was no evidence in the record that any of these three assertions was the proximate cause of Plaintiff's injuries. The Court therefore held that the jury could not have found that CCSD's conduct was the proximate cause of Plaintiff's injuries or reached its negligence verdict on any fair interpretation of the evidence. The jury verdict was overturned and the judgment against CCSD was reversed. *Clark County School Dist. vs. Payo*, 133 Nev. Adv. Op. No. 79 (October 2017).

NEVADA JURY VERDICTS

Personal Injury

Broken Toothpick Results in Verdict of Nearly $2 Million

Plaintiff, a 67-year old retired male, had been a member of Defendant Canyon Gate Country Club for more than 20 years. While attending a golf tournament and cocktail party at the club, he consumed bacon wrapped scallops served by Defendant Gourmet Foods, Inc. One of the scallops allegedly contained a one-inch long broken toothpick. The toothpick allegedly perforated Plaintiff's colon, which required resection with removal of one foot of his colon and removal of his gall bladder. Plaintiff also required laparotomies to treat infection of his liver and a hernia repair.

At trial, Plaintiff relied on the testimony of a food safety expert. Defendants denied liability, maintaining that no toothpick or wood was present during the event, and relied on the testimony of a food service expert.

Plaintiff also called a gastroenterologist, and a psychiatrist and pain management specialist to testify regarding his alleged damages. Defendants anticipated calling a general surgeon, but did not do so, and Defendants' gastroenterologist was unavailable to testify at trial.

Plaintiff sought $548,669.21 in medical expenses and served a pretrial offer of judgment for $1,249,999. Defendants offered $220,000.00. After a 19-day trial and more than seven hours of deliberation, the jury awarded Plaintiff a total of $1,923,669.21 in compensatory damages. *Wood v. Canyon Gate Country Club, et al.*, September 1, 2017

Defense Verdict after Fall from Ladder

Plaintiff, a 55-year old male, was employed as a bowling ball booth manager. While performing maintenance, Plaintiff fell from six-foot step ladder. Plaintiff claimed he was given the ladder to use by an employee of Defendant United States Bowling Congress. Plaintiff claimed the ladder was defective and damaged and that Defendant should have removed the ladder from the premises. Plaintiff relied on the testimony of a biomechanical engineer and safety engineer at trial.

Defendant denied liability, maintaining that Plaintiff was not given the ladder to use, nor was he authorized to use it. Defendant also argued that the ladder was clearly damaged prior to the incident, and that Plaintiff misused the ladder by stepping on the top step while overreaching, which caused him to fall. Defendant relied on the testimony of a human factors expert, who opined that Plaintiff improperly stepped on the top, damaged step.

As a result of the fall, Plaintiff allegedly sustained a traumatic brain injury, with central cord syndrome and permanent cognitive deficit. Plaintiff claimed that he required twenty-four hour care and would require a future cervical fusion. At trial, Plaintiff relied on the testimony of a neurosurgeon, a neuropsychologist and an economist. He also used the deposition testimony of his treating orthopedic physician. Plaintiff's wife, age 30, asserted a claim for emotional trauma allegedly caused by witnessing her husband fall.

Defendant relied on the testimony of a neuropsychologist, a psychiatrist, a neuro-radiologist and urologist to refute Plaintiff's alleged damages. Defendant also relied on the deposition testimony of an expert neurosurgeon.

Plaintiff sought past medical expenses of $1,232,779.00; $2,792,764.00 in future medical expenses; $336,065.00 for past lost wages; and $990,484.00 for future lost wages. Plaintiff's wife sought $1 million in emotional distress damages. Plaintiffs made a pretrial settlement demand of $16 million and Defendant served a $2 million offer of judgment. After a 20-day trial, and little more than one hour of deliberation, the jury unanimously found for Defendant. *Calhoon v. United States Bowling Congress*, September 12, 2017.

Police Not Liable for Injury to Inmate

An incarcerated male Plaintiff was being transported by Defendant Bennett, a police officer in the course and scope of his employment duties for Defendant Clark County Detention Center. Plaintiff alleged that Defendant Bennett negligently drove the right rear tire of the transport van over a curb. As a result of the impact, Plaintiff allegedly suffered an injury to his left shoulder which required surgery to repair. Plaintiff's treating orthopedic surgeon testified that Plaintiff's injury was causally related to the incident.

Defendants argued that Plaintiff's injury was preexisting and relied on the testimony of a radiologist, who opined that Plaintiff's injury was not acute.

Plaintiff sought $66,893.60 in medical expenses. Following a three-day trial, the jury deliberated for one hour before unanimously returning a verdict for the Defendants. *Morris v. Las Vegas Metropolitan Police Dept., et al.*, July 20, 2017.

Good Samaritan Awarded $35,000.00 Following Hit-and-Run

This case was tried on a one-day Short Trial following Defendant's appeal of a $19,030.29 arbitration award in favor of Plaintiff.

Plaintiff alleged that he was operating a 2003 Buick LeSabre as he exited the valet parking lot of non-party Texas Station Hotel and Casino, when he observed a collision between Defendant Murray, in a 2007 Chrysler Touring 300, and another motorist, in a Chevrolet Equinox. Plaintiff stopped behind Defendant Murray's vehicle to render assistance, but Defendant Murray allegedly placed her vehicle into reverse and collided with Plaintiff's front bumper. Defendant then collided again with the vehicle in front of her, again reversed into a second collision with Plaintiff's vehicle, and then fled the scene.

As a result of the multiple impacts, Plaintiff allegedly suffered injuries including cervical, thoracic, and lumbar soft tissue injuries, with radiating pain into his lower right leg. Plaintiff also alleged difficulty sleeping and hand tremors which interfered with his keyboard playing.

Defendant denied liability and argued that Plaintiff's complaints pre-existed the subject incident. Additionally, Defendant argued that Plaintiff contributed to his own injuries by blocking Defendant's vehicle with his own.

Following a three-day trial and thirty minutes of deliberation, the jury returned a verdict for Plaintiff in the amount of $35,000.00. *Carter v. Murray and Jones*, July 26, 2017.

Plaintiff Awarded $3,787.50 in "Sneeze Force" Parking Lot Collision

Following an arbitration award of $7,575.00 in Plaintiff's favor, Defendant appealed the case to the Short Trial Program.

Plaintiff, a 55-year old female, alleged that while stopped after reversing from a parking space, Defendant negligently backed into her vehicle. The collision allegedly caused cervical, thoracic, and lumbar soft tissue injuries. Her treating chiropractor opined that the injuries were causally related to the incident, as was the three months of chiropractic treatment she received.

Defendant denied liability and argued that Plaintiff actually backed into Defendant's vehicle. Defendant called a biomechanical expert who opined that the Delta V forces involved in the collision were the equivalent of a sneeze.

Plaintiff served a $6,400.00 pretrial offer of judgment, while Defendant offered $3,500.00. At the conclusion of the one-day trial, the jury awarded Plaintiff $7,575.00 in compensatory damages. The jury also found Plaintiff to be 50 percent at fault and her damages were therefore reduced to $3,787.50. *Hall v. McJilton*, July 21, 2017.

Medical Malpractice

Hospital and Nursing Staff Found Not Liable for Infant's Brain Damage

Pregnant Plaintiff was admitted to Defendant hospital after her membrane ruptured. After being admitted, Plaintiff was administered an epidural and external monitors were placed to monitor the progress of her contractions. The obstetrician, who settled with Plaintiff prior to trial, allegedly allowed Plaintiff to push for one hour and forty-five minutes before recommending an emergency caesarean section. Before the caesarean section was performed, however, Plaintiff experienced a uterine rupture. Plaintiff's infant son allegedly suffered hypoxic ischemic encephalopathy as a result of the rupture, resulting in brain damage.

Plaintiff alleged that the obstetrician and the hospital nursing staff fell below the standard of care by failing to properly anticipate or prepare for a cesarean section during the extended period of pushing, and the delivery did not occur until 21 minutes after the uterine rupture. Plaintiff further alleged that the obstetrician and nursing staff failed to bag and mask ventilate or intubate her infant son, and that the treating neonatologist failed to provide postpartum therapeutic hypothermia within six hours of birth as indicated by Neonatal Resuscitation Program guidelines. Defendant denied falling below the standard of care.

After a 15-day trial, the jury returned an inconsistent verdict. On the special verdict form, the jury first noted that the hospital nursing staff and obstetrician were negligent, but that hospital neonatal intensive care unit staff and the neonatologist were not. Next, the jury considered the issue of causation and found that the conduct of the obstetrician was a legal cause of the alleged injuries, but that the negligence of the hospital nursing staff was not.

Despite this finding as to causation, the jury subsequently attributed 40 percent of the negligence to the hospital nursing staff, and the remaining 60 percent to the obstetrician. The jury was dismissed without clarification regarding the inconsistent verdict. Following post-trial motions, the judge held that the obstetrician was 100 percent liable for the injury to Plaintiff's son, and entered judgment in favor of the hospital. *Kwak v. Sunrise Mountainview Hospital, Inc.*, July 27, 2017.

Post-Verdict Statutory Reduction Nets Plaintiff $370,203.24 for Finger Amputation

Plaintiff, a 15-year old female, went to non-party Southwest Medical Associates complaining of a mass on the middle finger of her left hand. Plaintiff was referred to Defendant Hillock for treatment. During the initial consultation Plaintiff's family expressed concern that the mass was cancer and Plaintiff may lose the finger. Defendant told Plaintiff and her family that she had a better chance of being struck by lightning than having finger cancer and assured her that she would not lose the finger.

Defendant diagnosed a benign neoplasm of the bone, recommending curettage and bone grafting. Plaintiff presented to non-party Centennial Hills Hospital for an excision of the left middle finger bony growth. During the procedure, Defendant placed a Penrose tourniquet, consisting of rubber tubing, tightly around Plaintiff's left middle finger.

Following the 45-minute surgery, while waiting in the post-anesthesia care unit, the nursing staff noticed the left middle finger was dusky and notified Defendant. Plaintiff was discharged from the hospital.

Plaintiff subsequently presented to a different non-party hospital emergency room. The hospital staff contacted Defendant and advised of Plaintiff's condition. When Plaintiff saw Defendant for follow up care, he informed Plaintiff that the mass on her finger was cancerous and the finger needed to be removed. Plaintiff sought a second opinion from a hand surgeon, who confirmed the finger was "dead" due to lack of blood flow resulting from the Penrose tourniquet placed by Defendant during the original surgery. Plaintiff's finger was later amputated.

Plaintiff alleged that Defendant, in the course and scope of his duties with Defendant Nevada Orthopedic and Spine Center, fell below the standard of care when he placed the tourniquet too tightly and failed to attempt to restore blood flow to the finger. Plaintiff relied on the testimony of a hand surgeon, who testified that the tourniquet left demarcations which were still present 30 days post-surgery. Plaintiff's expert opined that the loss of Plaintiff's finger was preventable if Defendant had unwrapped the tourniquet and attempted to restore the blood flow to her finger following the excisional biopsy.

Defendant denied falling below the standard of care, arguing that Plaintiff's finger was likely lost due to the tumor growth which damaged blood flow to the finger. Alternatively, Defendant argued that the finger was cancerous and required removal. Defendant called an orthopedic oncologist, who opined that the tourniquet could not cause the injury sustained, although he had no opinion about what could have caused the loss of Plaintiff's finger.

Plaintiff served a $175,000.00 pretrial offer of judgment; Defendant refused to make an offer. Following a ten-day trial, the jury deliberated for two hours before unanimously returning a verdict for Plaintiff awarding $650,000.00 in damages. The award included $50,000.00 in past medical expenses and $600,000.00 in past pain and suffering. The court reduced the verdict to comply with Nevada's statutory cap on non-economic damages of $350,000.00. Plaintiff's medical expenses were reduced to $20,203.24, for a total award of $370,203.24. *Rueda v. Nevada Orthopedic and Spine Center, L.L.P., et al.*, September 30, 2017

Breach Of Contract

Plaintiff Awarded $1.00 From Each of Two Defendants

Plaintiff, a voice over internet protocol company, alleged that when Defendants LaFrinere and Citea left Plaintiff's employ, they took data, stole customer and vendor lists, stole confidential trade secret information, destroyed cloud servers or deleted data from nine of thirty servers, and used confidential information to start up their own internet protocol company, Phoneroutes.

At trial, Plaintiff relied on a software, operating system and computer expert who testified regarding his examination of the computers Defendants used while in the employ of Plaintiff, including the hard drives, storage devices, cloud storage, messaging applications, drop boxes, and Skype accounts. He opined that an external or internal hard drive had been removed from each computer.

Defendants denied liability, arguing that there was no evidence to support Plaintiff's claims. Defendants alleged that Plaintiff made the claims out of vindictiveness and a misunderstanding of the technology involved in cloud servers, website generators, root passwords, and user accounts for various repositories. Defendants argued that Plaintiff failed to produce any financial records which reflected any loss of profits or other damages, and failed to offer any evidence of financial damage. Defendants countersued for abuse of process.

Plaintiff sought $2,313,141.00 in compensatory damages and Defendants served a $1,500.00 pretrial offer of judgment. At the conclusion of an eight-day trial the judge found for the Plaintiff regarding the Defendants' counterclaim. The judge then awarded Plaintiff $1.00 in compensatory damages against each of the two Defendants for breach of contract. The court found in favor of Defendants on all other claims. *VOIP Dialing, Inc. v. Phoneroutes, L.L.C.*, July 21, 2017.

Alverson Taylor Mortensen & Sanders
6605 Grand Montecito Pkwy, Ste 200
Las Vegas, NV 89149

If you would like to receive our
Nevada Legal Update via email please visit:
alversontaylor.com/subscribe

Comments

New Senate Bill Prohibits "Conversion" Therapy

Nevada's Senate Bill 201, which prohibits mental health professionals from performing "conversion" therapy on minors, was based on similar laws recently enacted in California and New Jersey. The bill was passed to protect children from the physical and psychological harm which can be caused by the therapy. The therapy aims to change an individual's sexual orientation or gender identity and has not been shown to be medically or clinically effective. Senate Bill 201 makes it illegal for a physician or other health professional to perform therapy on individuals younger than 18. This legislation was signed by Governor Sandoval on May 17, 2017, and was effective as of January 1, 2018.