

HIGHLIGHTS

Amendments to Medical Malpractice Statute Defining Healthcare Providers Do Not Apply Retroactively

NRS Chapter 41A, as originally enacted did not include physician assistants within the definition of “providers of healthcare.” The statute was subsequently amended in 2015 to include physician assistants. A physician’s assistant, being sued as a result of a 2012 surgery, asserted that the statute should apply retroactively and the \$350,000.00 cap on noneconomic damages in medical malpractice actions should apply. The Nevada Supreme Court disagreed.

Appeal and Retrial Prove Beneficial to Defendant

A defendant appealed a jury verdict in excess of \$2 million. The Nevada Supreme Court reversed the verdict in part and remanded the case for retrial. Plaintiff sought \$74,000.00 in past medical expenses, plus future medical expenses, lost wages and pain and suffering. The second jury returned a verdict totaling \$672,269.00.

Half-Million Dollar Award to Defendant on Counter-Claim for Breach of Contract

The plaintiffs in a breach of contract action asserted claims against their former attorney, claiming that the defendant started a competitor business based on proprietary information he obtained while working for plaintiffs. The defendant denied all allegations and countered that it was actually plaintiffs who interfered in his business dealings and sought to tarnish his reputation. The jury sided with the defendant.

NEVADA SUPREME COURT DECISIONS

MEDICAL MALPRACTICE

The 2015 Amendments to NRS 41A.017 Apply Prospectively to “Providers of Health Care”

Decedent Marry Haase sought treatment from orthopedic physician, Dr. Michael Elkanich, for pain in her leg and back. Dr. Elkanich diagnosed Ms. Haase with bilateral lower extremity radiculopathy and recommended surgery. Physician assistant, Jocelyn Segovia, was selected to assist in the procedure. The surgery took place on March 5, 2012, at Valley Hospital in Las Vegas. During the procedure, Dr. Elkanich and/or Ms. Segovia allegedly tore or sliced Ms. Haase’s aorta, causing substantial blood loss. According to the coroner’s report, Ms. Haase died mid-surgery. Litigation was subsequently commenced by Ms. Haase’s surviving child.

Defendant Segovia sought the protection of NRS 41A.017, which provides a cap on noneconomic damages of \$350,000.00 against providers of health care. The statute specifically identified the professions included in the definition of “provider of health care” and when the surgery was performed in March 2012, did not include physician assistants. In 2015, the statute was updated to include physician assistants. Ms. Segovia therefore asserted that the statute was always meant to include

physician assistants and the 2015 amendment was intended to simply clarify the definition. The district court determined, however, that Ms. Segovia was not entitled to the protection of NRS 41A.017, as physician assistants were not specifically identified in the 2012 definition. Defendant Segovia submitted a writ of mandamus to the Nevada Supreme Court.

In evaluating the issues, the Nevada Supreme Court first discussed the Keep Our Doctors in Nevada (KODIN) initiative, which was approved in 2004 by Nevada voters and led to the enactment of statutes limiting liability for health care providers. NRS 41A.017 defined “provider of health care” by listing specific positions and/or providers encompassed by the statute. The statute further provided that the amount of noneconomic damages in medical malpractice cases “must not exceed \$350,000, regardless of the number of plaintiffs, defendants or theories upon which liability [is] based.” NRS 41A.035.

Nevada law requires statutory amendments that clarify existing statutes to be applied retroactively.

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Defendant Segovia noted that testimony provided relevant to the 2015 amendments suggested the statute was amended to incorporate the Legislature's intent when enacting the original statute. She also maintained that, in an unpublished opinion in *Zhang v. Barnes*, the Nevada Supreme Court had already held that the 2015 amendments were meant to clarify rather than change the law.

Plaintiff maintained, however, that the Legislature specifically declared the 2015 amendment to be prospective. Section 11 of Senate Bill 292 stated that the "amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act." 2015 Nev. Stat., Ch. 439, §11, at 2529. Plaintiff further cited testimony from a KODIN representative indicating that physician assistants were added to the statute to address the way health care delivery had changed and "morphed" over the years.

The Court held that the Zhang decision, as cited by Ms. Segovia, did not refer specifically to NRS 41A.017. The Court also referenced its prior decision in Humboldt, in which the Court declined to apply the amendments to another facet of NRS Chapter 41A, specifically the expert medical affidavit requirement, retroactively.

In denying Defendant Segovia's writ, the Court ultimately concluded that the 2015 amendment adding "physician assistant" to the definition of provider did not apply retroactively. Statutory amendments are presumed to apply prospectively and the text of the legislation itself contained language that the "amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act." Ms. Segovia was therefore not a "provider of health care" pursuant to NRS 41A.017 at the time of the subject surgery in 2012. *Segovia v. Eighth Judicial Dist. Court*, 407 P.3d 783 (December 2017)

PERSONAL JURISDICTION

District Courts Lack Authority to Compel Out-of-State Attorneys to Appear for Deposition

On a Petition for Writ of Mandamus, the Nevada Supreme Court was asked whether a Nevada trial court had the authority to compel out-of-state attorneys to appear in Nevada for depositions as non-party witnesses.

The issue arose during litigation in Nevada District Court involving Wynn Resorts, Elaine Wynn and others. Petitioners were attorneys with a California-based law firm who represented Ms. Wynn in the litigation from January 2016 to March 2017. All four attorneys were California residents, but were granted pro hac vice admission in Nevada for purposes of that litigation only. While represented by California counsel, Ms. Wynn asserted claims against Wynn Resorts and its general counsel.

Approximately six months later, in or around September 2017, after the California counsel had withdrawn from their representation of Ms. Wynn, Defendant Sinatra filed a retaliatory "abuse of legal process" counterclaim against Ms. Wynn. Defendant Sinatra alleged that Ms. Wynn attempted to intimidate Defendant into accepting a settlement proposal, filed a pleading that asserted frivolous and false claims, and abused the discovery process. The abuse of process allegedly began in early 2016 when

Ms. Wynn was still represented by California counsel. In October 2017, Defendant Sinatra issued subpoenas in California, pursuant to California's Uniform Interstate Depositions and Discovery Act, directing counsel to appear for depositions in California in late October.

Counsel objected to the California subpoenas and filed a petition to quash the subpoenas in California Superior Court. While the petition was pending, Defendant Sinatra filed a motion in Nevada District Court seeking to compel the depositions of the attorneys. The motion to compel asserted that counsel filed a frivolous petition to quash in California and that because counsel had appeared before the district court as counsel for Ms. Wynn, the district court had personal jurisdiction. The California attorneys maintained, however, that the Nevada district court had no jurisdiction over a California discovery dispute.

The district court disagreed with counsel, finding that it had jurisdiction over the attorneys because they appeared in Nevada on a pro hac vice basis. The district court granted Defendant Sinatra's motion to compel and ordered the depositions to take place in Las Vegas.

In deciding the writ, the Nevada Supreme Court ultimately held that the district court lacked jurisdiction and could not require counsel to appear for depositions in Nevada as nonparty witnesses. The Court specifically noted that the "district court appeared to conflate personal

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jurisdiction with subpoena power.” The Court explained that personal jurisdiction is based on conduct that subjects an out-of-state party to the power of the Nevada court to adjudicate its rights and obligations in a legal dispute. Subpoena power, however, is based on the power and authority of the court to compel the attendance of a nonparty at a deposition in a legal dispute between other parties.

Moreover, the “inherent power of the court over attorneys is not limitless, and there is no logical connection between the court’s power to compel a nonparty witness to sit for deposition and the court’s power to regulate the legal profession and stop or redress professional misconduct by out-of-state counsel.” The district court had no authority to enforce out-of-state subpoenas issued to out-of-state nonparty witnesses or to compel those witnesses to appear in Nevada for deposition in a civil action. *Quinn v. Eighth Judicial Dist. Court*, 134 Nev. Adv. Op. 5, 410 P.3d 984 (February 2018)

NEVADA JURY VERDICTS

PREMISES LIABILITY

Plaintiff Found Comparatively At-Fault for Tripping Over Parking Bumper

Plaintiff allegedly tripped and fell over a parking bumper while walking in Defendant’s parking lot. Plaintiff alleged the parking bumper itself was inadequately marked and misplaced. Defendant denied liability, claiming that the condition was open and obvious, and additionally that Plaintiff was inattentive, which caused her to trip and fall.

Plaintiff sought \$125,000.00 in

medical expenses and made a pre-trial settlement demand for \$450,000.00. Defendant refused to make an offer. After a two-day jury trial, Plaintiff was awarded \$40,000.00 in compensatory damages. Plaintiff was also found to be 50 percent at fault and her award was therefore reduced to \$20,000.00. *Passante v. Speedee Mart, Inc. dba Speedee Mart*, October 17, 2017.

Plaintiff Receives Reduced Verdict on Re-Trial of Slip and Fall Case

Plaintiff, age 17 at the time of the alleged incident, slipped and fell on a sidewalk where Defendant allowed algae to grow. Defendant admitted negligence but argued that Plaintiff’s damages were not caused by the incident. Plaintiff reportedly sustained a herniated lumbar disk, which required surgical intervention. Despite surgery, Plaintiff had ongoing medical complaints.

When the case was first tried, in March of 2011, Plaintiff was awarded \$2,181,750.00 in damages. Defendant appealed the verdict to the Nevada Supreme Court, which reversed the decision in part and remanded the case for retrial.

At trial, Plaintiff sought \$74,000.00 in past medical expenses, \$750,000.00 in future medical expenses, and \$300,000.00 in future lost wages. Plaintiff made a pretrial settlement demand for \$995,000.00, and Defendant offered \$100,000.00. After an 11 day trial, the jury awarded Plaintiff \$672,269.00, including \$272,269.00 for past medical expenses, \$300,000.00 future medical expenses, and \$100,000.00 for past and future pain and suffering. *Salinas v. Donahue Schriber Realty Group, L.P.*, November 7, 2017.

Jury Finds for Defendant Following Grocery Store Slip and Fall

Plaintiff alleged that while shopping in Defendant’s grocery store

she slipped and fell on water or some other liquid on the floor. Defendant denied liability, maintaining that there was no water on the floor, or alternatively, even if water had been present it was not there long enough for Defendant to have noticed and taken corrective action.

As a result of the fall, Plaintiff allegedly sustained injuries to her shoulder and spine. Plaintiff incurred \$12,490.00 in medical expenses, and served a pretrial Offer of Judgment for \$13,900.00. Defendant countered with a \$1,000.00 Offer of Judgment. The case was tried as a one-day short trial. During closing arguments, Plaintiff asked the jury to award the full amount of medical expenses plus \$15,000.00 for pain and suffering. Instead, the four jurors found in favor of Defendant. *Wilkerson v. Smith’s Food and Drug Centers, Inc. dba Smith’s*, October 20, 2017.

Plaintiff Awarded Additional \$1,100 on Defendant’s Appeal of Arbitration Award

The parties entered into a commercial lease agreement on February 1, 2015, for a five-year lease term. Plaintiff alleged that Defendant subsequently breached the lease agreement when she failed to pay rent after July 2015 and abandoned the premises on July 29, 2015.

Plaintiff sought damages including \$17,906.20 in rent payments and \$4,522.70 for common area maintenance and other costs from August 2015 through May 2016. Plaintiff also sought \$2,566.86 for realtor commissions paid to re-lease the property. Defendant argued that Plaintiff failed to mitigate its damages by re-leasing the property before March 2, 2016 and argued that the \$7,753.20 initial security deposit should have been used to offset Plaintiff’s damages.

During the initial arbitration

proceeding, Plaintiff was awarded \$17,753.20, and Defendant appealed to the Short Trial Program. Following the one-day trial, the jury was out less than one hour before returning a verdict for Plaintiff for \$18,825.75. *Chau Living Trust v. Akopian*, October 24, 2017.

PERSONAL INJURY

Plaintiffs' Arbitration Award Reduced at Short Trial

Two Plaintiffs received arbitration awards of \$14,500.00 and \$14,000.00 respectively as a result of a motor vehicle accident. Defendant appealed the arbitration decision and the matter proceeded to a one-day short trial.

Plaintiffs were stopped for traffic on northbound Las Vegas Boulevard, intending to turn left onto the US Interstate 95 on-ramp, when they were rear-ended by Defendant Luna. Plaintiffs sustained unspecified injuries and sought medical expenses.

By stipulation, only four jurors presided over the short trial. The jury returned verdicts for the Plaintiffs for \$6,000.00 and \$5,000.00. *Nurridin-Young, et al. v. Luna, et al.*, September 1, 2017.

Defendant Successful on Appeal of Arbitration Decision

Plaintiff was rear-ended while stopped at a red light at the intersection of Pecos Road and Wigwam Parkway in Las Vegas. The matter was originally heard as part of Nevada's mandatory arbitration program for cases with a value of \$50,000.00 or less. Plaintiff received an arbitration award of \$16,100.01, and Defendant appealed the matter to the Nevada Short Trial Program.

As a result of the collision, Plaintiff allegedly sustained cervical and thoracic strains and sprains.

He sought \$8,100.01 in medical expenses. Defendant argued that the impact was minor resulting in only \$681.00 in damages to Plaintiff's vehicle. Defendant maintained that Plaintiff was not injured as a result of the accident and that his complaints were the result of preexisting cervical arthritis.

Four jurors deliberated following the one-day short trial and awarded Plaintiff \$2,603.12 in compensatory damages. *Bogin v. Peterson*, September 1, 2017.

BREACH OF CONTRACT

Defendant Awarded \$500,000.00 on Counter-Claim

Defendant Asher worked with Plaintiffs as outside counsel for more than ten years. Defendant then worked for three years as the point person for Plaintiffs' partnerships, obtaining necessary gaming licenses and negotiating with other parties. After Defendant Asher resigned, he established and managed Brandywine Bookmaking, a sports gaming operation that allegedly employed proprietary concepts that he usurped from Plaintiffs. Plaintiffs alleged that Defendant diverted profitable business opportunities with a well-respected casino services provider, which delayed Plaintiffs' commencement of operations in Nevada for several months. Plaintiffs also alleged that Defendant Asher failed to repay his partnership debt, breached his contract, fiduciary duty, and confidentiality agreement, and was unjustly enriched.

Defendant countered that during the final year of his employment, he was subjected to vitriolic tirades from his direct supervisor, which was the principal reason he left Plaintiffs' employment. Defendant also alleged that as part of his constructive termination and forced resignation, he had specific conversations with

Plaintiffs' chairman regarding the circumstances of his employment and/or the business opportunities he intended to pursue which included race and sports betting. Allegedly, Plaintiffs' chairman was aware of Defendant Asher's intentions and did not object as they did not compete with Plaintiffs' business plan which focused on mobile gaming in Nevada.

Defendant asserted that after his termination, Plaintiffs changed their business plan to pursue race and sports betting opportunities in Nevada, and then pursued claims against him in an attempt to damage his reputation and business opportunities. Further, Plaintiffs waited approximately four years to assert any claims until Defendant had already contracted to sell Brandywine Bookmaking. Defendant therefore alleged that Plaintiffs breached the contract, covenant of good faith and fair dealing, and were unjustly enriched.

After an 18 day trial, the jury found for Defendant on the claims asserted by Plaintiffs and awarded Defendant Asher \$565,000.00 on his counterclaim. *Cantor G & W (Nevada) Holdings v. Asher et al.*, November 17, 2017.

MEDICAL MALPRACTICE

Unanimous Verdict in Favor of Defendant Oral Surgeon

The 42 year old Plaintiff alleged that Defendant oral surgeon fell below the standard of care when he failed to diagnose and treat an infection with antibiotics in a timely manner.

Plaintiff specifically alleged that she developed an infection after Defendant removed her wisdom teeth. Plaintiff asserted that Defendant failed to timely prescribe appropriate antibiotics and, as a result, she required hospitalization

and a subsequent surgical procedure. Defendant maintained that no infection was present postoperatively, and that the infection must have developed after Plaintiff stopped seeking care and treatment from Defendant.

Plaintiff sought \$41,000.00 in medical expenses. After a four-day trial, the jury unanimously returned a verdict in favor of Defendant. *Satran v. Johnson, D.D.S.*, October 20, 2017.

Defense Verdict in Case of Alleged Medical Malpractice for Damaged Uterus

Plaintiff alleged that Defendant, a gynecologist, fell below the standard of care when she allegedly burned Plaintiff's right ureter during a surgical hysterectomy procedure. At trial, Plaintiff relied on the testimony of a retained expert gynecologist who opined that Defendant fell below the standard of care. Plaintiff further alleged that as a result of Defendant's negligence, she suffered stress incontinence.

Defendant denied falling below the standard of care and asserted that Plaintiff experienced a delayed thermal injury from the electrocautery unit used during the procedure, which was a known risk. The onset of the injury occurred approximately two weeks after the procedure. Defendant also argued that Plaintiff's social history indicated several risk factors, including smoking. Defendant similarly relied on an expert gynecologist who opined that Defendant met the standard of care, and that there was no direct burn during the surgical procedure.

Defendant also relied on the testimony of an expert urologist who opined that Plaintiff's ureter was not cut or transected. Rather, the stress incontinence was the result of tissue tension or necrosis. Stress incontinence is also another known risk with a hysterectomy, and even in the absence of a hysterectomy stress

incontinence occurs as women age.

Plaintiff sought medical expenses of \$196,855.04. After a seven-day trial and less than one hour of deliberation, the jury returned a verdict for Defendant. *Tablak v. Women's Health Associates of Southern Nevada-Martin, et al.*, December 5, 2017

COMMENTS

Trend in Short Trials Suggests that Jury Verdicts are More Favorable to Defendants than Awards Rendered in Arbitration

In Nevada, cases with a projected value of \$50,000.00 or less remain in the mandatory arbitration program. Those cases are decided by a court appointed arbitrator, based on an arbitration hearing that is largely informal and may last only a few hours. A decision rendered by the arbitrator is appealable to the Nevada Short Trial Program. Trials in the Short Trial Program last only one full day and are generally heard by a four person jury panel. The reported verdicts from those short trials heard on an appeal of an arbitration award, suggest that the short trials are often beneficial to the Defendants.

In *McDaniels v. Gotovac*, decided September 8, 2017, Defendant and Plaintiff were involved in a motor vehicle collision in a parking lot. Both parties alleged that the other party was at fault. As a result of the collision, Plaintiff allegedly sustained cervical, thoracic and lumbar soft tissue injuries. The matter proceeded through arbitration and the arbitrator determined liability was split 50/50. Plaintiff was awarded \$25,000.00. Defendant appealed. During the short trial, Plaintiff sought \$9,100.00 in medical expenses. After hearing the evidence and argument, the four presiding jurors returned a verdict in favor of Defendant.

In another matter, *Armendariz v. Gerdts*, Plaintiff, an Internal Revenue Service agent, was operating a 2009 Honda and traveling southbound on Durango Drive as it approached Deer Springs Way in Las Vegas. As Plaintiff executed a right turn to enter a shopping center, Defendant, operating a 1998 Ford, was allegedly travelling northbound in the same shopping center and failed to yield the right-of-way.

Plaintiff alleged that Defendant was speeding and that Defendant's vehicle continued to move northbound after the collision. Both parties claimed right-of-way and that the other caused the collision. As a result of the accident, Plaintiff allegedly sustained a closed head injury, cervical, thoracic and lumbar soft tissue injuries, and injuries to her jaw and leg. Plaintiff sought w\$16,000.00 in medical expenses, \$5,800.00 in lost wages and was awarded \$45,832.34 by the arbitrator. Defendant appealed and the case was tried as a short trial in September 2017. The four presiding jurors returned a verdict for Defendant.

Other reported cases, as discussed in the case summaries above, demonstrate that on appeal, even if a complete defense verdict is not obtained, the juries regularly return verdict amounts less than those awarded by the arbitrator. Appealing an arbitration decision does have risks as an appealing party who fails to obtain a more favorable judgment may be ordered to pay the opposing party's fees and costs. It may, however, be beneficial depending upon the facts and circumstances of the incident at issue, the presentation of the parties, and the alleged damages. We are continuing to research and follow the reported cases that address this issue and the potential benefits of appeal to Defendants.

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