

HIGHLIGHTS

The Supreme Court of Nevada Reviews the Work-Product Privilege

The Supreme Court of Nevada provided clarity as to when the work product privilege is waived as it relates to the disclosure of documents. Ultimately, if there is a common interest in the litigation between the parties, the privilege will apply.

Damage from Cherry Results in Six Figure Medical Malpractice Verdict

Plaintiff bit down on a cherry pit, resulting in a fractured tooth. Defendant dentist recommended extraction, a bone graft, an implant, and a sinus push, but allegedly perforated Plaintiff's sinus membrane while performing the procedure. The jury awarded over \$120,000.00 in damages including past and future medical expenses and pain and suffering.

Plaintiff Forty-Nine Percent At-Fault, But Still Recovered Over \$50,000.00

While crossing a Nevada highway, the Plaintiff was struck by Defendant's car. After stipulating to the reasonableness of all of Plaintiff's medical treatment, the parties argued liability. Ultimately, Plaintiff limped away with over \$50,000.00 after the jury found him 49 percent at fault.

NEVADA SUPREME COURT DECISIONS

WORK PRODUCT PRIVILEGE

Email Correspondence Protected by the Work-Product Privilege if the Parties Share a Common Interest in the Litigation

James Cotter served as CEO and Chairman of the Board of Directors of Reading International, Inc. (Reading). After Cotter was terminated, he filed a complaint in the district court alleging a breach of fiduciary duty against several members of Reading's Board. Numerous Reading shareholders (the intervening Plaintiffs) filed a derivative action against the same Board members, also alleging a breach of fiduciary duty. The district court consolidated the two actions.

During discovery, the district court granted a motion in favor of Defendants compelling Plaintiff to provide a supplemental privilege log. Subsequently, Plaintiff produced 350 communications, but labeled approximately 150 emails between himself and his counsel, and intervening Plaintiffs and their counsel, as protected by the work-product privilege.

Defendants thereafter sought to compel production of the privileged emails, arguing that Plaintiff waived his claim of work-product protection by sharing the communications with the intervening Plaintiffs.

Defendants specifically argued that there was no joint prosecution agreement or confidentiality agreement between Plaintiff and the intervening parties.

The district court heard oral argument, but failed to conduct an in camera review of the emails before ordering Plaintiff to produce them. The petition for writ followed shortly thereafter. The Supreme Court of Nevada, in reviewing the matter for an abuse of discretion, noted that "this [C]ourt rarely entertains writ petitions challenging pretrial discovery," but felt that the resulting prejudice of the disclosure would be irreparable. The Court further noted that without relief, compelled disclosure of the assertedly privileged emails would occur and Plaintiff would have no effective remedy even through a subsequent appeal.

Plaintiff argued that the work-product privilege was applicable, because he shared a common interest in the litigation with the intervening Plaintiffs. Conversely, Defendants

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claimed that the district court correctly concluded no common interest existed. The Supreme Court of Nevada determined that unlike the attorney-client privilege, “selective disclosure of work product to some, but not to others, is permitted, and disclosure to third parties does not automatically waive the privilege.” *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. et al.*, 133 Nev. Adv. Op. 52, 399 P3d 334, 349 (2017).

The Nevada Supreme Court further noted that numerous jurisdictions have recognized a broad common interest rule. For the common interest rule to apply, the transferor and transferee must anticipate litigation against a common adversary on the same issue or issues and have strong common interests in sharing the fruit of the trial preparation efforts. The Court opined that no written agreement was required to find a common interest, but if the privileged materials were disclosed to an adversary, waiver was usually found.

Ultimately, the Court found that Plaintiff and the intervening Plaintiffs, whose actions were consolidated, were all shareholders of Reading and asserted derivative claims against the same real parties in interest. Moreover, the intervening Plaintiffs did not assert any claims against the primary Plaintiff. Therefore, there was a common interest and the district court erred in ruling that the emails must be disclosed absent an in camera review of the communications. *Cotter v. Eighth Jud. Dist. Ct., et al.*, 134 Nev. Adv. Op. No. 32 (May 2018).

DISCRETIONARY-IMMUNITY DOCTRINE

**Discretionary-Act
Immunity Not Absolute
When a Police Officer
was Responding to an
Emergency**

On November 5, 2012, Sergeant John Cargile was attempting to respond to an emergency. A large hill located on of the southwest corner of an intersection obstructed the view of both Sergeant Cargile and another driver, Ms. Glover-Armont. Sergeant Cargile was attempting a left turn against a red traffic light when his vehicle collided with Ms. Glover-Armont’s vehicle, injuring Ms. Glover-Armont. The parties stipulated that Sergeant Cargile activated his emergency lights, but contested whether Sergeant Cargile used his siren.

Glover-Armont sued Sergeant Cargile and the City of North Las Vegas. Glover-Armont specifically alleged that Sergeant Cargile failed to use due care and failed to engage his siren in the course of responding to an emergency. Defendants moved for summary judgment, arguing that discretionary-act immunity barred Plaintiff’s claims. Plaintiff conceded that Sergeant Cargile’s decision to proceed against the red traffic signal in an emergency was discretionary; however, she maintained that his failure to use his siren and proceed without due care as required by NRS 484B.700 was not discretionary.

Defendants’ motion for summary judgment was denied and Defendants subsequently moved for reconsideration. After a hearing, the district court granted Defendants’ motion. Without addressing NRS 484B.700, the district court found

that Sergeant Cargile used his individual judgment in deciding whether and how to proceed against the red traffic signal and that his decisions were discretionary, such that Defendants were entitled to discretionary-act immunity. To further support its decision, the district court cited public policy concerns, and noted that Sergeant Cargile acted to protect the public, enforce the law, and apprehend criminals.

On appeal, the Supreme Court of Nevada noted that the primary issue was whether discretionary-act immunity provided Defendants an affirmative defense. Plaintiff asserted that the district court erred by granting summary judgment as several questions of fact remained, including whether Sergeant Cargile used due care pursuant to NRS 484B.700 and whether his siren was activated.

In assessing the parties’ arguments, the Supreme Court of Nevada noted that Nevada generally waives sovereign immunity; however, an exception to the waiver for discretionary acts is provided in NRS 41.032(2). The Court reaffirmed its adoption of the federal Berkovitz-Gaubert two-part test for determining whether a state actor is protected by discretionary-act immunity.

The Court agreed with Plaintiff, finding that the duty to comply with NRS 484B.700’s requirements was not discretionary. NRS 484B.700

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allows an officer to proceed through a red traffic signal when responding to an emergency, but imposes a mandatory duty to do so with due regard for the safety of all persons and he must use audible and visual signals. A police officer's duty to drive with due care when responding to an emergency was mandatory, not discretionary, and the officer must proceed with due regard for the public's safety. The action therefore failed the first part of the Berkovitz-Gaubert test.

Ultimately, the Supreme Court of Nevada held that the district court erred in granting Defendants' motion for summary judgment. The Court determined that there remained a question of fact as to whether Sergeant Cargile proceeded with due care. *Glover-Armont v. Cargile and the City of N. Las Vegas*, 134 Nev. Adv. Op. 49 (July 2018).

NEVADA JURY VERDICTS

MEDICAL MALPRACTICE

Maraschino Cherry Causes Significant Problems Resulting in \$127,832.00 in Compensatory Damages

Plaintiff, a Nevada resident, was enjoying a sundae with a maraschino cherry. When Plaintiff bit into the cherry, she bit down on the cherry pit and cracked her number fourteen tooth. Plaintiff sought dental treatment from Defendant Wang who diagnosed a fractured tooth and recommended extraction, a bone graft, an implant, and a sinus push.

On April 26, 2012, Defendant Wang allegedly perforated Plaintiff's sinus membrane with grafting

material as he performed the implant and sinus push. Plaintiff also alleged that Defendant Wang reviewed postoperative X-rays, but failed to diagnose or recognize that he had perforated the sinus membrane. At her follow-up visits on May 3 and June 7, 2012, Plaintiff allegedly complained of pain and sinus pressure, but Defendant Wang failed to diagnose the injury or the resulting infection.

On July 26, 2012, Plaintiff presented to an emergency department with complaints of a severe headache, facial numbness, and pressure. Treating staff made a diagnosis of maxillary sinus disease. Plaintiff returned to Dr. Wang on July 30, but Defendant Wang again allegedly failed to diagnose the injury.

Plaintiff alleged that, as a result of Defendant Wang's negligence, she required endoscopic sinus surgery and removal of a foreign body from the maxillary sinus. Defendant denied falling below the standard of care. After a nine-day trial and six-plus hours of jury deliberation over a two-day period, the jury found for Plaintiff, awarding \$127,832.00 in damages consisting of \$79,596.00 for past medical expenses, \$11,250.00 for future medical expenses, \$38,298.00 for past pain and suffering, and \$1,688.00 for future pain and suffering. *Murawski v. Chen and Assocs., P.C., dba Significance Dental Specialists & Wang, D.M.D.*, March 22, 2018.

Jury Unconvinced that Defendants Fell Below the Standard of Care in Performing Hysterectomy

Plaintiff, a 56-year old Nevada resident and homemaker, was referred to Defendant Women's Cancer Center for evaluation and treatment regarding post-menopausal

bleeding and an abnormal Pap smear. Defendant Gould diagnosed Plaintiff with carcinoma, post-menopausal bleeding, and cervical intraepithelial neoplasia (CIN3). Defendant Gould's treatment plan included a cold-knife conization (CKC) to rule out cancer, dilation and curettage and/or hysterectomy, as indicated.

Defendant Gould subsequently performed a total laparoscopic hysterectomy. During that procedure, Dr. Gould allegedly lacerated Plaintiff's left common iliac artery and dissected Plaintiff's small bowel, which resulted in hemorrhaging. The laparoscopic procedure was converted to a laparotomy, which resulted in a long abdominal incision.

Additionally, Plaintiff alleged that due to the lacerated iliac artery and damaged bowel, she required repair of multiple vascular injuries, a small bowel resection with reanastomosis and bilateral ureterolysis, and sustained blood loss of approximately 3,000 milliliters.

Plaintiff further alleged that she subsequently developed a ventral incisional hernia and required a laparoscopic-assisted and open component separation incisional hernia repair with mesh placement. This procedure reportedly involved abdominal wall reconstruction, without resolution of her condition. Plaintiff also alleged that she had residual pain, disfigurement, and was disabled. Defendants denied falling below the standard of care.

Plaintiff sought \$525,000.00 in medical expenses and her spouse asserted a claim for loss of consortium. After an eight-day trial, the jury found in favor of Defendants. *Lime v. Women's Cancer Ctr. of Nev. & Gould, M.D.*, March 1, 2018.

PERSONAL INJURY**Plaintiff Recovers \$53,840.31 after Being Found Forty-Nine Percent at Fault**

Plaintiff, a Nevada resident and student, alleged that he was struck by Defendant's vehicle as he crossed a crosswalk near the on-ramp to southbound U.S. 95 from Boulder Highway. Defendant exited Boulder Highway and was travelling at approximately forty-five miles per hour when the collision occurred. Plaintiff specifically alleged that he proceeded across the ramp after seeing a "walk signal."

As a result of the impact, Plaintiff allegedly sustained numerous injuries, including serious damage to the right upper extremity requiring surgery of the right hand and several steroid injections to the right elbow.

Defendant, a homemaker, denied liability alleging that Plaintiff ran into the roadway leaving Defendant insufficient time to perceive and react to Plaintiff's sporadic action. Defendant also asserted that Plaintiff was not in a crosswalk and that there was no "walk signal." Defendant called an independent eyewitness to support her assertions. Defendant also relied on the testimony of a biomechanical engineer and accident reconstructionist, who opined that Plaintiff was not in the crosswalk and was running when the accident occurred.

The parties stipulated to the necessity and reasonableness of Plaintiff's treatment, but the case was tried on comparative fault. Plaintiff sought \$80,569.24 in stipulated medical expenses and served a \$100,000.00 pretrial offer of judgment. Defendant refused to make any offer. After a four-day trial and four hours of deliberation, the

jury unanimously awarded Plaintiff \$105,569.24 in damages, including \$80,569.24 for medical expenses and \$25,000.00 for pain and suffering. The jury also determined that Plaintiff was forty-nine percent at fault, thereby reducing his total award to \$53,840.31. *Delacruz v. Allen*, March 22, 2018.

Plaintiff Dancing Again after \$3,500,000.00 Verdict

Plaintiff, female, age 31 and a former dancer, alleged that Defendant Stepanyan, a 60-year old cab driver, negligently changed lanes into Plaintiff's travel lane and sideswiped Plaintiff's vehicle. The subject accident occurred while Defendant Stepanyan was within the course and scope of his employment duties, operating a taxicab for Defendant Nevada Yellow Cab. Plaintiff alleged that Defendant Stepanyan's impatience resulted in his failure to slow, his failure to check his mirrors, and his failure to shoulder check before the subject accident.

Plaintiff allegedly sustained a cervical injury and required a cervical fusion. Plaintiff also alleged she had ongoing residuals. Plaintiff called her orthopedic physician, who opined that Plaintiff's cervical fusion was casually related to the subject incident.

Defendants denied liability and advanced an alternative explanation of the incident. Defendants alleged that a non-party motorist travelling ahead of Defendants' vehicle caused a sudden emergency and the resulting accident. Defendants also relied on the testimony of a neurosurgeon who opined that Plaintiff's injuries fully resolved within ten to eleven months post-accident, and that the cervical fusion was unrelated to this accident. The video from

Defendants' taxicab was shown to the jury.

Plaintiff served a pretrial offer of judgment of \$499,999.00 and Defendants countered with \$75,000. After a five-day trial and two hours of deliberation, the jury unanimously awarded Plaintiff \$3,500,000.00. *Pizanowski v. Nevada Yellow Cab Corp. & Stepanyan*, April 27, 2018.

PRODUCT LIABILITY**Plaintiff Awarded \$20 Million, Including Punitive Damages, for Traumatic Brain Injury**

Plaintiff, aged 15 and a Nevada resident, was a guest on Defendant's premises. Plaintiff alleged that while swinging on a swing the crossbar on the swing set failed and struck him on the head. Consequently, Plaintiff sustained a traumatic brain injury with residual brain damage. Plaintiff also alleged that Defendant failed to inspect the swing properly to ensure that it was safe for guests to use. At trial, Plaintiff relied upon the testimony of a neurosurgeon, radiologist, neurologist, and psychologist.

Defendant denied all liability and relied on the testimony of an expert neurologist and neuro-psychologist.

Prior to trial, Park Pro, who was responsible for assembling the park equipment, settled with Plaintiff for its policy limit of \$1,000,000.00. Additionally, Playland International Inc., who designed and manufactured the swing, settled for an undisclosed amount.

Plaintiff sought compensatory and punitive damages. After a nine-day trial and two-plus hours of jury deliberation, the jury found for Plaintiff, awarding \$10,000,000.00

in damages, including \$750,000.00 for past pain and suffering and \$9,250,000.00 for future pain and suffering. The second phase was a one-day trial to determine whether punitive damages were appropriate. The jury awarded Plaintiff another \$10,000,000.00 in punitive damages. *Thompson v. Lamplight Village at Centennial Springs Homeowners Assoc.*, February 15, 2018.

BREACH OF CONTRACT

Breach of Oral Contract Results in Verdict for Plaintiff

Plaintiff, a commercial real estate brokerage company, alleged Defendants hired Plaintiff to negotiate a long-term ground lease of a hotel property. Plaintiff alleged that Defendants agreed to pay Plaintiff a thirty-seven percent commission on the total value of the lease if Plaintiff was able to close the deal. Defendants allegedly failed to tender payment of the commission after the lease was successfully negotiated. Defendants denied liability, asserting that they did not agree to pay any commission to Plaintiff.

Plaintiff's served a pretrial offer of judgment for \$612,150.00. Following a six-day trial and just over one hour of deliberation, the jury awarded Plaintiff a total of \$612,150.00. *Reed Commercial Properties, Inc. v. One Trop, L.L.C. & Lipschultz*, February 13, 2018.

Plaintiff's Involuntary Commitment to a Mental Institution Not Enough to Persuade Jury

Plaintiff, a Nevada resident, alleged that Defendant homeowners' association, through its authorized agent (a Nevada law firm), made misrepresentations, was guilty of

fraud, and wrongfully foreclosed on Plaintiff's residence. Following the foreclosure, Plaintiff's home was purchased by Canalino Dr. Trust, for \$4,100.00. Plaintiff asserted that Canalino Dr. Trust acted in concert with the homeowners' association and its agent to purchase the property.

Plaintiff also alleged that the law firm sent correspondence demanding payment of homeowners' association arrearage in the amount of \$2,000.00. The correspondence reportedly included a payment deadline date that was after the actual foreclosure date. Plaintiff further alleged that he was not provided the opportunity to make an installment payment to avoid the foreclosure action, and that Defendants' actions caused him to sustain emotional trauma and be involuntarily committed to a mental institution. Defendants denied all liability.

As a result of Defendants' alleged conduct, Plaintiff sought compensatory damages and unspecified medical expenses. After a four-day trial, the jury found for Defendants. *Hillman v. Santa Barbara Homeowners' Assoc.*, January 25, 2018.

COMMENTS

Changes at the Supreme Court of Nevada

In 2018, Chief Justice Michael L. Douglas and Associate Chief Justice Michael A. Cherry announced their plans to retire when their terms on the Supreme Court of Nevada ended in January 2019. This departure signaled that at least two Supreme Court seats would be vacant for the Nevada November 2018 general election ballot.

On November 6, 2018, seats C, F, and G of the Supreme Court of Nevada were available. Incumbent

Justice Lidia Stiglich easily defeated opponents to retain her seat on the Supreme Court. On January 10, 2019, Justice Abbi Silver and Justice Elissa F. Cadish were sworn in as Justices during an investiture ceremony in Carson City.

Justice Abbi Silver graduated from Southwestern University School of Law in Los Angeles, California in 1989. Justice Silver worked as a law clerk for the Eighth Judicial District Court before joining the Clark County District Attorney's Office. During her time at the District Attorney's Office, Justice Silver was the Chief Deputy District Attorney of the Special Victims Unit. Justice Silver was elected to the Las Vegas Municipal Court in 2003, the Las Vegas Justice Court in 2006, and twice to the Eighth Judicial District Court, in 2008 and 2014. In December 2014, Governor Brian Sandoval appointed Justice Silver as one of the three inaugural judges of the Nevada Court of Appeals. She was reelected to said court in 2016. Justice Silver served as the first female Chief Judge of the Nevada Court of Appeals until her election to the Supreme Court of Nevada in November 2018.

Justice Elissa F. Cadish earned her Juris Doctor from the University of Virginia School of Law in 1989. After graduation, Justice Cadish moved to Las Vegas where she began her legal career as a law clerk in the United States District Court for the District of Nevada. Thereafter, Justice Cadish entered private practice where she focused on commercial litigation and employment law. In July 2007, Justice Cadish was appointed by Governor Jim Gibbons to serve as a District Judge in Department 6 of the Eighth Judicial District Court. Justice Cadish continued to serve as a Nevada District Court Judge until her election to the Supreme Court of Nevada.

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