

HIGHLIGHTS

Semantic Loophole Cannot Save Doctor from Fees for a Defense without Foundation

The Nevada Supreme Court held that the standard of review for a finding that a defense was maintained without reasonable ground is not contingent upon magic words. While the Court agreed that the district court could have elaborated further on the necessity of fees, there was no abuse of discretion based solely the lack of the phrase, "no credible evidence."

Jury Finds Infection to Blame Instead of Obstetrician

A cesarean section ended with an injured bowel and Plaintiff alleged that the cause was Defendant obstetrician's negligence. Plaintiff contended that the obstetrician harmed her jejunum during the procedure but Defendant maintained the cause was an infection caused by an abscess, pointing out that the first signs of distress did not occur until eleven days after the procedure.

Stolen Diamond Leaves College "Friend" Owing Sizeable Damages

After discovering a college friend had made a habit of entering their home without permission, Plaintiffs warned Defendant against entering their home in the future. Plaintiffs later came across Defendant at a charity gala, where they found his girlfriend wearing Plaintiffs' 11 carat diamond ring. Defendant admitted to pilfering the precious stone, then attempted to dissuade Plaintiffs from taking legal action. After a three-day trial, the jury returned a verdict against the defendant for conversion and fraudulent misrepresentation.

NEVADA SUPREME COURT DECISIONS

MEDICAL MALPRACTICE

Plaintiff Awarded Costs and Attorney Fees for Physician's Unreasonable Defense of Liability

In an appeal from a judgment in the Eighth Judicial District Court for Clark County, the Nevada Supreme Court affirmed the jury verdict and the district court's award of costs and attorney fees to a former student-athlete from the University of Nevada, Las Vegas (UNLV). Beau Orth, a scholarship football player at UNLV, was referred to Dr. Albert Capanna after suffering lower back and leg pain. Dr. Capanna diagnosed Mr. Orth with a bulging disc and was optimistic that after surgery to repair the disc herniation, Mr. Orth would be able to return to football. Unfortunately, Dr. Capanna performed the needed operation on the wrong disc. This surgical error resulted in further pain and complications for Mr. Orth, and a negligence suit against Dr. Capanna followed.

Instead of conceding liability for the surgical error, Dr. Capanna mounted a defense and proceeded to trial on both negligence and damages. After an eleven-day trial, the jury determined Dr. Capanna acted negligently and awarded Mr. Orth \$4,286,000.00 in damages that included past and future medical expenses, pain, suffering, disability, and loss of enjoyment of life. Additionally, the district court awarded Mr. Orth costs, which included \$69,975.95 for expert witness fees, and

a partial award for attorney fees finding Dr. Capanna's defense of liability was maintained without reasonable ground.

Dr. Capanna appealed the jury verdict and several of the district court decisions, including the award of expert witness fees. Nevada Revised Statute 18.005(5) allows the court to include, within an award for costs, reasonable expert witness fees. These fees are typically not to exceed payment for five witnesses in an amount of not more than \$1,500.00 per witness; however, the provision also allows the court to award a larger fee after determining the circumstances around the expert's testimony were of such necessity as to require a larger fee. Dr. Capanna contended the district court decision to award expert witness fees in excess of \$1,500.00 lacked the express and careful analysis required to deviate from the statutory guideline. While the Supreme Court acknowledged the district court could have, and perhaps should have done more to elaborate on the necessity of the fees, there was no abuse of discretion in awarding the fees in this case.

The award of attorney fees was also unsuccessfully challenged by Dr. Capanna.

IN THIS ISSUE

NEVADA SUPREME COURT DECISIONS	
Medical Malpractice	1
Legal Malpractice	2
NEVADA JURY VERDICTS	
Medical Malpractice	3
Personal Injury	3
Premises Liability	4
Breach of Contract	5
COMMENTS	5

Nevada Revised Statute 18.010 provides the mechanism by which the court may award attorney fees. The district court found that Dr. Capanna's defense to liability for negligence was maintained without reasonable ground and not supported by any credible evidence. When a defense is maintained without reasonable ground, a court has broad discretion to award attorney fees and even to impose Rule 11 sanctions set forth in the Nevada Rules of Civil Procedure. This policy is intended to deter frivolous or vexatious claims or defenses which burden judicial resources and negatively impact meritorious claims.

Dr. Capanna asserted that the district court applied the wrong standard when it described the evidence of Dr. Capanna's liability as "overwhelming" as opposed to not supported by credible evidence. The Supreme Court of Nevada was unpersuaded by this argument pointing to the district court's opinion which, when viewed in its totality, was clear that no credible evidence was presented to show Dr. Capanna had any defense to liability. The district court went so far as to point out Dr. Capanna's own experts testified to his liability. The lack of the phrase "no credible evidence" in the district court order was insufficient to show the district court utilized the wrong standard. The Nevada Supreme Court again found no abuse of discretion and affirmed the award of attorney fees. *Capanna, M.D. v. Orth*, 134 Nev. Adv. Op. 108 (Dec. 27, 2018).

LEGAL MALPRACTICE

Courts Could Not Extend Statute of Limitations in Legal Malpractice Action

Plaintiff Branch Banking & Trust (Branch) hired attorney Douglas Gerrard of Gerrard Cox & Larsen (Gerrard) to represent it in a real property dispute regarding deed of trust priority. The district court entered judgment against Branch. After appeal, the Supreme Court of Nevada affirmed the district court's order on May 31, 2013.

After Branch's unsuccessful attempts

of rehearing and *en banc* reconsideration under Rule 40 of the Nevada Rules of Appellate Procedure, the Supreme Court of Nevada issued its remittitur order on March 18, 2014, which closed the appeal process. Within 90 days thereafter, Branch timely filed its petition for a writ of certiorari with the United States Supreme Court. This writ petition was denied on October 6, 2014.

Subsequently, Branch filed its complaint for legal malpractice in the underlying case against Gerrard on October 5, 2016. The district court granted Gerrard's motion to dismiss as the complaint failed to state a claim upon which relief could be granted. The district court agreed with Gerrard that the legal malpractice statute of limitations had expired before Branch filed its complaint.

Nevada Revised Statute 11.207(1) provides a two or four year statute of limitations for a legal malpractice claim: two years from the time the client discovers the claim and four years from the time the client suffered damage, whichever applies first. There was no dispute between the parties that the alleged malpractice was timely discovered making the two year statute of limitations applicable. However, case law provides a litigation malpractice tolling rule which provides that "the damages for a malpractice claim do not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling for the underlying litigation." *Brady, Vorwerck, Ryder, & Caspino*, 130 Nev. 632, 642 (2014).

Branch successfully tolled the two year statute of limitations when it timely filed its appeal from the district court. Essentially, the two year clock did not start until the

underlying case was completely resolved after appeal. The question was therefore, on what date was the case completely resolved. Branch argued to the district court that the case was not final until the U.S. Supreme Court denied the writ petition and Branch filed its legal malpractice complaint one day before the two year mark after that denial. Conversely, Gerrard argued and successfully persuaded the district court that the case was resolved on March 18, 2014, when the Supreme Court of Nevada issued its remittitur.

In Nevada, an appeal concludes when the appellate jurisdiction ends upon issuance of the remittitur from an appellate court to a district court. NRAP 41(a). The Nevada Rules of Appellate Procedure allow the remittitur to be stayed if the party seeking the writ petition files a motion to stay the remittitur pending the petition decision of the U.S. Supreme Court. NRAP 41(b)(3). Branch never filed a motion to stay the remittitur, thus, it filed its complaint more than two years after the remittitur was issued requiring the Supreme Court of Nevada to affirm the district court's ruling that the complaint was time-barred. The decision by the U.S. Supreme Court to review a writ petition is completely discretionary. For policy reasons, the Supreme Court of Nevada emphasized the importance of the remittitur issuance procedure as it gives all parties in litigation certainty in the finality of litigation. The issuance of the remittitur "provides a 'bright-line' event to count from; and in counting time, a bright-line rule serves all." *Branch Banking & Tr. Co. v. Gerrard, Esq.*, 134 Nev. Adv. Op. 106 (Dec. 27, 2018).

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NEVADA JURY VERDICTS

MEDICAL MALPRACTICE

Jury Sides with Doctor after Patient Suffers Heart Attack

Plaintiff, a 59 year-old patient who was employed as a cardiac catheterization manager, claimed Defendant doctor fell below the standard of care. Defendant allegedly failed to implement the hospital's protocols after Plaintiff suffered a heart attack following a successful shoulder surgery. Plaintiff asserted that instead of being transferred to the Intensive Care Unit, he should have been transferred immediately to the Cardiac Catheterization Lab and an angiography should have been performed to remove the coronary artery clot. Plaintiff claimed the 204 minute delay between his stabilization and his transfer to the Cardiac Catheterization Lab caused irreversible heart muscle damage. Defendant denied falling below the standard of care. Plaintiff sought unspecified medical expenses. After a seven-day trial, the jury rendered a verdict for the defense. *Cardenas v. Sierra Anesthesiology, Inc. & Metcalf, M.D.*, January 31, 2018.

Jury Renders Defense Verdict for Obstetrician

Plaintiff, a 37 year-old patient, asserted Defendant obstetrician fell below the standard of care when her bowel was injured during a cesarean section. Plaintiff's expert, an obstetrician, opined that Defendant negligently injured the jejunum area of Plaintiff's bowel during the procedure. Defendant asserted the injury was not caused by negligence, but rather by an infection attributed to abscesses of the bowel which had adhered to the abdominal wall before later breaking free and leaking. Defendant's expert, also an obstetrician, testified that surgical glue was used to close

the outer layer, not sutures, and that the first signs of bowel issues did not occur until eleven days after the procedure and were in fact caused by infection. Plaintiff sought \$680,000.00 in medical expenses. After a ten-day trial, the jury found for Defendant. *Companiononi v. Olds, M.D.*, July 20, 2018.

PERSONAL INJURY

Tow Truck Company Cannot Salvage Verdict

Plaintiff was driving her Nissan Cube when she was struck by a runaway tow truck which had rolled out of a gas station, across a median, and into her vehicle. Plaintiff further alleged that the tow truck struck her vehicle with sufficient force to propel her vehicle into the adjacent lane where it collided with additional vehicles. Plaintiff asserted claims against Defendant towing company, the tow-truck driver, and Defendant Navistar, Inc. who designed, manufactured, and installed the replacement parking brake handle. According to Plaintiff, the tow-truck driver was either distracted, drowsy, and/or under the influence which caused him to exit the truck without selecting the proper gear. Plaintiff further alleged Navistar was negligent in the design, engineering, and manufacture of the parking brake handle. Furthermore, Plaintiff contended Navistar should have warned the driver of the defective handle.

At trial, Plaintiff relied on the testimony of a mechanical engineer and a metallurgical engineer, as well as her treating physicians, an orthoped, a pain management specialist, and a chiropractor. She also relied upon the deposition testimony of two additional orthopedists. Plaintiff allegedly suffered bilateral rotator cuff tears of the shoulders and developed lumbar facet syndrome as a result of the impact.

Defendants denied liability and argued comparative fault. Defendants relied on the expert testimony of a biomechanical trauma specialist and injury causation expert, who asserted that Plaintiff's alleged injuries were not causally related to the subject incident.

Plaintiff sought \$282,000.00 in past medical expenses and \$600,000.00 in future medical expenses. After a 17 day trial, the jury awarded Plaintiff \$3,382,000.00 in total damages. The towing company was found to be 25 percent at fault and Navistar was determined to be 75 percent at fault. *Cobos v. JMR & CLS, Inc., et al.*, May 29, 2018.

Arbitration Award Upended

On Defendants' appeal of an arbitration award of \$26,000.00, split equally between two Plaintiffs, the case proceeded to the Nevada Short Trial Program. Plaintiffs Ulteras-Botello and Zerega-Fernandez claimed Defendant Veliz, son of Defendant Vazquez, was driving his mother's vehicle when he impacted the rear of their vehicle. Plaintiffs alleged Vazquez negligently entrusted the vehicle to her son. Plaintiffs sought \$10,457.10 and \$9,999.60 in medical expenses respectively.

Defendants claimed the impact of the collision was minor and produced insufficient Delta V forces to cause injury. Defendants made a pretrial offer of \$13,802.00 to be split equally between Plaintiffs. The offer was declined and after a one-day trial and twenty minutes of deliberation, the jury returned a defense verdict. *Ulteras-Botello & Zerega-Fernandez v. Veliz & Vazquez*, June 1, 2018.

Rider Fails to Shift Responsibility for Out of Control Motorcycle

Plaintiff was a longtime patron of Defendant's motorsports company which provided regular maintenance service on Plaintiff's motorcycle. Plaintiff alleged that while operating his motorcycle the throttle became stuck in the open position causing the motorcycle to uncontrollably gain speed. Plaintiff claimed his only option was to lay down the motorcycle while traveling at a high speed resulting in significant injuries, including multiple fractures, and "road rash" lacerations and abrasions, which required multiple surgeries and implants.

Plaintiff alleged the open throttle condition was a result of Defendant's negligence in the maintenance and inspection of the motorcycle.

Plaintiff relied on the testimony of a pair of motorcycle experts, while Defendant called a mechanical engineer and motorcycle accident reconstructionist. Defendant denied liability and asserted the maintenance was properly performed. Plaintiff sought more than \$109,000.00 in past medical expenses and an unspecified amount for future medical expenses. After a four-day trial, the jury returned a unanimous verdict for the Defendant. *Jensen v. BJ Motorsports, L.L.C., dba Ridenow Powersports*, August 30, 2018.

Tractor Trailer Plaintiff Found Worthy of Comparative Fault but Not Damages

Plaintiff, a 40 year-old self-employed truck driver, was operating a tractor trailer for Plaintiff All in Trucking. He was attempting to make a right turn when he was struck by Defendant. Plaintiffs alleged that Defendant was attempting to pass the tractor trailer when he collided with Plaintiffs' vehicle. At trial, Plaintiffs called the investigating police officer to testify.

Defendant, a 62 year-old male and court-appointed receiver, denied liability and alleged that he was stopped at the stop sign when Plaintiff driver made an improper right turn, causing the collision. Defendant called a trucking safety expert who contended that Plaintiff driver made an improper turn and that Plaintiffs did not suffer any loss of income.

Plaintiffs sought \$11,140.00 in property damage, plus \$60,000.00 to \$90,000.00 in lost income. Plaintiffs made a pretrial demand of \$60,000.00 and Defendant served a \$5,001.00 Offer of Judgment. After a four-day trial, the jury found Plaintiff driver to be 60% at fault for the collision, thereby barring Plaintiffs' recovery, and awarded no damages. *All In Trucking, L.L.C.; and Hastings v. Pearson*, July, 26 2018

PREMISES LIABILITY

Plaintiff Partially at Fault for Fall at Laundry Center

Plaintiff allegedly fell after stepping onto a platform to add fabric softener into a top loading washing machine at Defendant laundry center. Plaintiff claimed the platform was too small and did not meet the applicable building code, and that there should have been hand holds near the platform to prevent falls. Plaintiff sustained injuries to her left wrist, including several small fractures, a partial loss of use, and a loss of sensation, and required multiple surgeries and implants.

Defendant denied liability and asserted Plaintiff was familiar with the laundry center and had been using the facilities for six to nine months without incident. After a jury trial, Plaintiff was awarded \$76,855.14 in compensatory damages. Plaintiff was, however, determined to be 25 percent at fault and her recovery was reduced accordingly to \$57,641.36. *Alpizar v. Galioto, dba Champion Laundry Center*, February 13, 2018.

Dog Bite Results in Significant Verdict Against Owner

Plaintiff, age 62 and employed as a legal assistant, was walking her two small dogs in her neighborhood when she walked past Defendant's residence. As Plaintiff passed, she could hear dogs barking and throwing themselves at the gate. Shortly thereafter, Defendant's two pit bulls ran out of a fenced yard and attacked Plaintiff's two small dogs. Plaintiff alleged Defendant should have known his dogs had vicious and dangerous traits which created an unreasonable danger to the public.

Plaintiff claimed the stress she was exposed to as a result of the incident led to an acute myocardial infarction. Defendant denied liability, advanced the defense of no notice, and made a \$30,000.00 pretrial settlement offer. After an eight-day trial, the jury awarded Plaintiff \$13,000.00 in medical expenses, \$165,000.00 in lost

wages, and \$250,000.00 for pain and suffering, for total damages of \$428,000.00. *Sampson v. Dobarro*, July 18, 2018.

Bellagio Bets on Trial and Wins

While visiting the Bellagio Resort and Casino, Plaintiff, a 58 year-old female, slipped and fell on a wet marble floor. Plaintiff alleged Defendant Bellagio was negligent in its maintenance and knew, or should have known, that a wet marble floor would be extremely slippery. Plaintiff further claimed that Defendant failed to warn guests of the dangerous condition. As a result of the fall, Plaintiff suffered a shattered kneecap and a torn meniscus requiring surgical repair.

At trial, Plaintiff relied on the testimony of a biomechanical engineer and accident reconstructionist, and an orthopedic physician, and sought \$25,000.00 in medical expenses. After a six-day trial, the jury returned a defense verdict. *Antone v. Bellagio, L.L.C., dba Bellagio Resort and Casino*, August 20, 2018.

Plaintiff Awarded Damages for Toxic Chemical Inhalation

Plaintiff alleged that she and her husband were staying in a suite adjacent to a swimming pool at non-party resort when toxic fumes penetrated their room. The fumes specifically penetrated Plaintiff's BiPap apparatus. Plaintiff alleged Defendant's contractors and/or employees began using a mix of toxic chemicals as part of a swimming pool project while she was sleeping in the early morning hours. Plaintiff also alleged that Defendant failed to provide a safe premises for its guests.

As a result of breathing in the toxic fumes, Plaintiff allegedly suffered injuries to her eyes, ears, and nasal passages, as well as her respiratory and neurological systems. Defendant denied liability. Plaintiff sought an unspecified amount for medical expenses. After a seven-day trial the jury returned a unanimous verdict for Plaintiff, but awarded only \$900.00 in

compensatory damages. *Browning v. Grand Desert Resort Vacation Owners Association, Inc.*, July, 17 2018.

BREACH OF CONTRACT

Jury Finds in Favor of Owner of Waste Disposal Facility

Plaintiff, the owner of a solid waste disposal facility, entered into an agreement with Defendant for disposal of waste at Plaintiff's facility. Defendant performed under this agreement for years paying the agreed upon base rate for disposal, fuel fees, and environmental fees. However, Plaintiff alleged that, in 2013, Defendant failed to pay in excess of \$230,726.00.

Defendant denied liability for breaching the contract and the covenant of good faith and fair dealing. Defendant claimed Plaintiff breached terms of the agreement by overcharging for fuel and environmental fees, suspending Saturday delivery days, and locking Defendant out of the facility. Defendant alleged Plaintiff's actions caused Defendant to suspend deliveries to Plaintiff's facility and counter-claimed for damages. After a four-day trial, the jury awarded Plaintiff \$235,035.44 in compensatory damages. *Refuse Inc. v. Nevada Recycling and Salvage, Ltd.*, February 15, 2018.

Plaintiff Awarded More Than \$60,000.00 for Diamond Ring Converted by College Friend

Defendant, a Nevada visitor and college friend of Plaintiffs, repeatedly visited his friend unannounced and uninvited. Plaintiffs eventually discovered that their friend had been in their residence alone and without permission on numerous occasions. Plaintiff husband subsequently installed a \$13,000.00 upgrade to the home security system and asked Defendant not to enter the residence uninvited.

Sometime later, while attending a charity gala, Plaintiffs encountered Defendant and

his then girlfriend. Plaintiffs recognized a ring Defendant's girlfriend was wearing, an approximately 11.05 carat diamond ring and platinum anniversary band. Plaintiffs recognized the ring because it was identical to a \$65,150.00 ring Plaintiff husband gave to his wife nearly two years prior.

Upon returning home, Plaintiffs confirmed the ring was missing. Plaintiffs contacted Defendant's girlfriend who informed Plaintiffs she received the ring as a gift from Defendant one year before. The girlfriend returned the ring to Plaintiffs and the Defendant later admitted he had stolen the ring.

In an effort to encourage Plaintiffs to forgo action on the stolen ring, Defendant misrepresented connections to the diamond district and a goldsmith. Plaintiffs were unpersuaded and filed an action for conversion, fraud, misrepresentation, personal injury, and intentional infliction of emotional distress. After a three-day trial, the jury returned a verdict for Plaintiffs awarding \$64,628.00 in compensatory damages, representing \$45,628.00 for conversion and \$11,500.00 for fraudulent misrepresentation. The additional \$7,500.00 was awarded for emotional distress. *Kho v. Gaylor*, July 26, 2018.

COMMENTS

Substantial amendments to the Nevada Rules of Civil Procedure took effect on March 1, 2019, which means that for the last few months, firms and attorneys across the Silver State have been evaluating and modifying their standard motion language and calendaring systems. Rule 16.1 of the Nevada Rules of Civil Procedure is one such rule that saw not only stylistic changes, but some substantive changes as well.

Rule 16.1, like many of the amended rules, parallels the Federal Rules in most respects while retaining some Nevada specific exceptions. Some of the most notable changes are the amendments to Rule 16.1(b). Pursuant to Rule 16.1, counsel were required to meet for an Early Case Conference (ECC) to discuss

the proposed discovery schedule and deadlines. Additional topics to be addressed at the ECC now include any need for confidentiality or protective orders, as well as the preservation and storage of electronically stored information (ESI). In personal injury cases, the parties must disclose the names of any medical providers and provide signed HIPPA compliant authorizations to obtain records from those physicians. Previously 16.1(b) required counsel to attend the ECC in-person to confer and discuss witnesses, discovery, and disclosures. The changes now allow counsel to meet remotely using audio or audiovisual technology: however, any time saved by eliminating the required commute, may be lost with the new requirements. Counsel and their clients may now be required to appear for a discovery conference with the presiding judge to discuss and confirm the requested discovery.

The contents of Rule 16.1(a) regarding the list of names and documents for affirmative disclosure, have also changed. In addition to providing the contact information for prospective witnesses and tangible prospective evidence, parties must now disclose any record, report, or statement, in any form, including ESI in video, audio, e-mail, or other format. Furthermore, the terms "record" and "report" have been expanded to include logs, prior reports, summaries, and maintenance records.

Finally, the amendments to Rule 16.1(a) (2) formally distinguish expert witnesses who must provide a written report from expert witnesses who need not provide a report, and from treating physicians retained to provide testimony. Treating physicians need not provide anything beyond their treatment notes unless their testimony will extend to matters beyond the course and scope of treatment, including issues of causation. Any witness retained or specifically employed to provide expert testimony must prepare a signed, written report.

Additional, substantial changes to the Nevada rules and the impact they may have on ongoing litigation will be discussed in this newsletter in the coming months.

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