



HIGHLIGHTS

Supreme Court Declines to Adopt Standard Definition of “Product” for Purposes of Strict Products Liability

Plaintiff suffered personal injuries after 150-foot fall from a sign caused by a defective floor board. Defendant, the designer and manufacturer of the sign, was granted summary judgment on the basis that the sign was not a product for the purpose of strict product liability. Plaintiff appealed and the Nevada Supreme Court determined that the sign was a product, even though it was a custom one-of-a-kind product and not mass produced, because Defendant was in the business of manufacturing and selling custom signs.

Defendant Ambulance Company Prevails After Sixteen-Day Trial Due to Third-Party Causation

Plaintiff was the passenger on a scooter that collided with Defendant’s ambulance. Defendant successfully alleged that the driver of the scooter caused the accident, and the jury found for Defendant.

Plaintiff Awarded Over \$1 Million After Defendant Appeals \$45,000 Arbitration Award

Plaintiff was T-boned by Defendant who allegedly failed to yield at a stop sign. Plaintiff was awarded \$45,000.00 at arbitration, but Defendant appealed, alleging that Plaintiff was comparatively negligent. The jury awarded over \$1.3 million in medical expenses and compensatory damages, which was reduced to approximately \$1.1 million based on Plaintiff’s comparative negligence.

NEVADA SUPREME COURT DECISIONS

ATTORNEYS’ FEES AND COSTS

A Voluntarily Dismissed Defendant May be a “Prevailing Party” for the Purpose of Recovering Fees and Costs

Plaintiff owned a condominium in the Signature at MGM Grand which suffered damage caused by an MGM employee. Plaintiff sued Defendant The Residences at MGM Grand - Tower A Owners’ Association and three other MGM entities. Two of the entities filed a Motion to Dismiss, arguing that the Signature was the only entity responsible for the damage. Defendant did not file a Motion to Dismiss at that time, but could have made an identical argument. Plaintiff filed an amended complaint which included Defendant and four other entities.

Defendant sent demand correspondence to Plaintiff, requesting dismissal from the action because it was not a proper party. Plaintiff agreed to file a voluntary dismissal, but failed to do so. After several months, Defendant again requested that Plaintiff file the notice of dismissal as agreed but was informed that a substitution of attorney had occurred and Defendant should contact the new counsel. The new counsel had not yet read the file and deferred discussion on the matter until he had an opportunity to review the claims. After several months, Plaintiff’s new counsel had not yet contacted Defendant to discuss the request or filed the notice of

voluntary dismissal. Plaintiff continued to prosecute the case against the other Defendants, but did not include Defendant in discovery or the Joint Case Conference Report. Defendant filed a Motion to Dismiss or, in the alternative, Summary Judgment. Plaintiff did not respond to Defendant’s motion but stipulated to dismiss Defendant from the case, with prejudice. The stipulation expressly reserved Defendant’s right to seek attorney fees and costs.

Defendant moved for fees and costs and Plaintiff opposed the motion, arguing that a voluntarily dismissed defendant was not a “prevailing party” under NRS 18.010(2) and NRS 18.020 because there was no final judgment. The district court held that Defendant was a prevailing party for purposes of the statute because Plaintiff likely would have lost the motion to dismiss, which would have resulted in a final judgment. Defendant was awarded \$9,431.25 in fees and \$497.56 in costs. Plaintiff appealed.

The Supreme Court of Nevada reviewed the issue of “whether a dismissal with prejudice is sufficient to confer

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prevailing party status on the Defendant for purposes of NRS 18.010(2) and NRS 18.020.” The meaning of “prevailing party” as used in these statutes implicated a question of law and was therefore reviewed de novo. Under NRS 18.010(2), when the prevailing party has not recovered more than \$20,000.00, or when the claim was brought or maintained without reasonable ground, the prevailing party may recover costs against any adverse party against whom judgment is rendered. Plaintiff asserted that a voluntary dismissal with prejudice was not a judgment on the merits and could not support a claim for fees and costs. The Court had previously held that a voluntary dismissal as a result of a good faith settlement was not a judgment on the merits and did not allow for a claim of attorney fees. See *Works v. Kuhn* 103 Nev. 65, 732 P.2d 1373 (1987), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 35 P.3d 964 (2001). This was, however, not a bright line rule and the Court had not yet addressed this issue in the context of a pending dispositive motion. The Court analyzed the holdings of several federal circuit courts for guidance on this issue.

Federal courts have reasoned that a voluntary dismissal with prejudice is considered an adjudication on the merits for the purpose of *res judicata* and the issue of attorney fees is sufficiently similar that the same reasoning may be applied. Additionally, when a plaintiff agrees to dismiss a defendant in order to avoid an unfavorable judgment on a dispositive motion, the defendant, in effect, has prevailed. In order for a party to receive prevailing party status, the legal relationship between the parties must be altered; therefore, the dismissal must be with prejudice.

The Nevada Supreme Court reviewed

Defendant’s Motion to Dismiss and determined that the motion would likely have been granted if Defendant had not been voluntarily dismissed. Therefore, Defendant would have obtained a final judgment if the motion had been heard. Defendant was dismissed with prejudice, which altered the legal relationship of the parties and created a final resolution of the matter. The Court also considered Defendant’s express reservation of the right to collect fees and costs in the stipulation. The Nevada Supreme Court therefore affirmed the award of fees and costs to Defendant. *145 East Harmon II Trust v. The Residences at MGM Grand-Tower*, 136 Nev. Adv. Op. 14, April 2020.

NEGLIGENCE

Negligent Acts Within the “Common Knowledge” of the Jury May Sound in Ordinary Negligence Rather than Professional Negligence

Decedent Mary Curtis was admitted to Defendant nursing home for physical and mental health care. While under Defendant’s care, a nurse accidentally administered another patient’s dose of morphine to Decedent. The nurse recognized her mistake and informed the physician, who ordered a dose of Narcan to reverse the effects of the morphine and monitored Decedent’s vital signs for the rest of the day. Decedent remained alert and responsive that evening and the physician did not transfer her to a hospital. The next morning, however, Decedent was unresponsive and transferred to a hospital for additional care. Decedent died three days later from morphine intoxication. Decedent’s Estate sued Defendant, asserting claims for elder abuse, wrongful death, and breach of the implied warranty of good faith and fair dealing. The estate explicitly

did not assert claims for professional negligence and did not name the nurse as a defendant.

NRS 41A.071 requires that a plaintiff file an expert affidavit with the complaint to maintain a claim for professional negligence against a medical professional. Plaintiff did not file an expert affidavit and Defendant filed a Motion for Summary Judgment on this ground. Plaintiff argued that the affidavit was not required because it had not filed claims against the physician or nurse individually and because the claims were based in ordinary negligence. The district court held that, although Plaintiff’s claims were directly against the nursing home rather than the nurse and used the text of the elder abuse statutes, the gravamen of the claims sounded in professional negligence and therefore required an expert affidavit. The Motion for Summary Judgment was granted and Plaintiff appealed.

The Nevada Supreme Court analyzed Plaintiff’s claims to determine if they sounded in ordinary negligence or professional negligence. While expert testimony was generally required when the alleged negligence involved medical diagnosis, judgment, or treatment, many courts recognized a narrow “common knowledge” exception. This exception “applies where the carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience, and the claim can be resolved without expert testimony.” Actions that require medical testimony include decisions resulting from medical judgment or that involve a breach of the standard of care, such as decisions regarding which medication to prescribe or which information to disclose to the patient’s family. Claims resulting from these decisions must include an expert affidavit. On the other hand, a jury may



recognize, without expert testimony, the negligence of a pharmacist who fills a prescription with the wrong medication or a dentist who extracts the wrong tooth as these were clearly careless acts.

The Nevada Supreme Court analyzed Plaintiff's claims in two parts: (1) the mistaken administration of morphine to Decedent by the nurse and (2) the failure of Defendant to properly monitor and treat Decedent following the administration of the drug. The actions of the nurse fell into the narrow common knowledge exception because a juror of average intelligence would understand that mistakenly administering narcotics was a careless act. This action did not require medical judgment, as the prescribing physician had already made the necessary medical judgment and the nurse was attempting to carry out his orders. The gravamen of this claim was ordinary negligence that did not require an expert affidavit. The exception did not extend to Plaintiff's claim that the nursing home failed to properly monitor or care for Decedent. The decision of when or how to monitor and treat a patient did require professional judgment and raised questions beyond the common knowledge of the average juror. The nursing home's physician decided to administer the Narcan to counteract the morphine, decided not to transfer Decedent to a hospital, and decided to monitor Decedent for the remainder of the day. Expert testimony was required to establish whether each of these actions was within the standard of care. The gravamen of this claim was in professional negligence and an expert affidavit was required at the time of filing Plaintiff's complaint.

The Nevada Supreme Court reversed the district court's decision as to the nurse's negligence and affirmed the decision as to the nursing home's actions

regarding the Decedent's subsequent monitoring and care. *Estate of Mary Curtis, et al. v. South Las Vegas Medical Investors, LLC, et al.*, 136 Nev. Adv. Op. 39, July 9, 2020.

PRODUCT LIABILITIES

A Custom-Made MGM Sign Was a Product for the Purpose of Strict Products Liability

Plaintiff Schueler was hired to service the neon lights on a large MGM Grand sign located on top of a 150-foot tall steel pylon. While completing the service, Plaintiff was walking on the interior platform when a panel affixed to the floor as part of the sign's original design failed and Plaintiff fell 150 feet to the ground, suffering serious bodily injury. The sign was designed, manufactured and installed on the pylon by Defendant Ad Art between 1993 and 1994. No subsequent changes were made to the sign.

Plaintiff sued Defendant for strict products liability, among other claims. Defendant filed a Motion for Summary Judgment arguing the sign was not a product for the purpose of strict liability and that the statute of repose was applicable. The motion was initially denied on the basis that Defendant was in the business of manufacturing signs, the sign was a product, and one-of-a-kind products were not exempt from product liability claims. Defendant moved for reconsideration and the motion was granted on the basis that the sign was not a product that was subject to product liability. Plaintiff appealed.

The Nevada Supreme Court recognized that this case turned on the definition of a "product" for the purpose of strict products liability. After thorough consideration of the history of products liability and the associated policy

considerations, the Court recognized that, while no specific definition had been adopted, it had been long recognized that the doctrine of products liability in tort was governed by the Restatement (Second) of Torts Section 402A. The Second Restatement likewise did not provide a standard definition; rather, it employed the policy objectives of deterring negligent behavior, spreading the costs of loss among consumers, and a plaintiff's ability to prove negligence of a remote seller or manufacturer. The Restatement also provided a non-exhaustive list of tangible items to which the doctrine of strict liability may be applied. A custom-made sign was not specifically included on this list.

The Nevada Supreme Court had deliberately refrained from adopting a precise definition, instead using a case-by-case approach for each product. In this case, the Court invited supplemental briefing and *amicus curiae* on the question of the proper definition of a product under Nevada product liability law. After considering the various responses, the Court concluded that it was not necessary to adopt a standard definition. The Restatement was sufficient to resolve the instant case and a case-by-case methodology was the more prudent approach as the Court may consider factors including changes in technology.

Defendant argued that the sign was analogous to a building, which was found in *Calloway v. City of Reno* to not be a product for the purpose of product liability, because it was one-of-a-kind and not mass produced. 116 Nev. 250, 993 P.2d 1259 (2000). Plaintiff argued that the the holding in *Calloway* was narrow and confined to the facts of that case because the decision was based on the economic loss doctrine rather than the nature of the product itself. The Court agreed and declined to extend *Calloway*



to the facts of this case.

The Court ultimately concluded that the MGM sign was a product for several reasons. First, while the sign was affixed to the pylon, it was capable of being removed and transported elsewhere and fixtures of real property were not per se exempt from strict liability. Second, even though the sign was one-of-a kind and not mass produced, Defendant was in the business of manufacturing signs, which were usually custom-made for each client. To exempt custom-made pieces would exempt a whole industry from product liability claims, which would work against public policy. Third, Plaintiff alleged bodily injury, not just economic loss. Therefore, the MGM sign was a product within the meaning of strict liability and the district court erred in granting summary judgment. *Charles Schueler v. Ad Art, Inc.*, 136 Nev. Adv. Op. July 30, 2020.

incident, but all personal information of the injured parties, including names, addresses, social security numbers, and medical information, was redacted. Ms. Sekera insisted on receiving the full reports so she could contact the parties as potential witnesses to establish that her injuries were foreseeable and to gather information to show that she was not contributorily negligent. The Venetian moved for a protective order, which Sekera opposed. The Discovery Commissioner recommended that the court grant the protective order to protect the privacy interest of the individuals. The Commissioner further recommended that Sekera review the redacted reports to identify similar accidents that occurred in the same area and the parties conduct a dispute resolution conference pursuant to EDCR 2.34 to address those reports. If the parties could not reach an agreement, Sekera could file an additional motion. Sekera objected to these recommendations and the district court agreed, denying the motion for a protective order. The Venetian filed a writ of mandamus with the Nevada Supreme Court, which was the appropriate remedy for the prevention of improper discovery.

information, the parties' resources, the importance of the discovery in resolving the issues, and the burden of expense compared to the likely benefit. Additionally, a court should analyze whether the party seeking the protective order has shown good cause and whether redaction of the subject material would allow for disclosure.

The court held that the district court abused its discretion by failing to address the proportionality of the evidence or analyze whether the Venetian had good cause for its protective order. These analyses were highly factual in nature and outside the scope of the Nevada Supreme Court's review. The writ of mandamus was granted and the district court was ordered to vacate its order denying the Venetian's motion for a protective order and conduct further proceedings. *Venetian Casino Resort, LLC et al. v. The Eighth Judicial District Court et al.*, 136 Nev. Adv. Op. 26, May 14, 2020.

PROTECTIVE ORDERS

Protective Order was Improperly Denied When District Court Failed to Analyze the Proportionality Requirement in NRCP 26(b)(1)

Recent changes to Rule 26 of the Nevada Rules of Civil Procedure regarding the scope of discovery have caused some confusion as to its applicability. The Nevada Supreme Court sought to clarify the applicability in this discovery dispute.

Ms. Sekera, a real party in interest, slipped and fell on the marble flooring of the Venetian Casino Resort and sustained serious injuries. In the course of discovery, Ms. Sekera requested that the Venetian produce all slip-and-fall incident reports from the previous three years. The Venetian complied, producing sixty-four incident reports. The reports included the dates and facts of each

The Venetian argued the district court analyzed the relevancy of the unredacted reports, but did not adequately consider the proportionality requirement under NRCP 26(b)(1). The Court agreed. While the Supreme Court will not generally disturb a district court's discovery ruling, it may review the decision for abuse of discretion. The failure to fully apply both the relevancy and proportionality requirements of NRCP 26(b)(1) was an abuse of discretion.

A proportionality analysis should consider the importance of the issue at stake, the amount in controversy, the parties' access to the relevant

NEVADA JURY
VERDICTS

BREACH OF CONTRACT

No Breach of Contract When Marijuana Cultivator Refused Payment to Friend who Helped Obtain Cultivation License

Defendant wished to begin a marijuana cultivation business but did not have the liquid funds required to apply for a marijuana cultivation license. In March 2014, Defendant expressed this desire to Plaintiff who agreed to help him apply for the license. Plaintiff and her family members formulated a plan for development of the business and prepared the necessary paperwork for



Defendant's Clark County license, along with a personal letter of attestation in support of the application indicating the availability of liquid funds. In exchange for her help, Defendant agreed to pay Plaintiff one percent of the marijuana cultivation business. Once the Clark County license was approved, Defendant informed Plaintiff that he no longer needed her help to seek a license from the State of Nevada and did not pay Plaintiff any percentage of the business. Plaintiff sued for breach of contract, alleging that Defendant was cultivating marijuana on the license she helped obtain, bringing in significant revenue, and that he misrepresented his intentions.

Defendant was granted judgment as a matter of law on the issue of fraud. After a six-day trial and two days of deliberation, the jury found for Defendants. *Jiles v. GFive Cultivation, LLC and Smith*, July 22, 2019.

PERSONAL INJURY

Defendant's Appeal of \$45,000 Arbitration Award Results in \$1.3 Million Verdict for Plaintiff

Plaintiff, a plumber/pipefitter, was operating a 1997 Chevrolet pickup truck on Sandstone Bluffs Drive when Defendant allegedly failed to yield at a stop sign and T-boned Plaintiff's vehicle. Plaintiff allegedly sustained a herniated lumbar disk at L5-S1, resulting in residual pain requiring future medical care. Plaintiff incurred \$38,000.00 in medical expenses. Plaintiff was awarded \$45,000.00 through arbitration. Defendant appealed and the case proceeded to a five-day trial.

At trial, Plaintiff relied on the testimony of a pain management doctor and an orthopedic specialist, to establish his residual pain and future medical needs. Defendant relied on the

testimony of two orthopedic specialists to refute Plaintiff's alleged injuries. After two plus hours of deliberation, the jury found Plaintiff to be twenty percent at fault and Defendant eighty percent negligent. Plaintiff was awarded a total of \$1,391,692.52, representing \$38,192.52 in past medical expenses, \$1,050,500.00 in future medical expenses, \$15,000.00 for past pain and suffering and \$288,000.00 for future pain and suffering. This reward was reduced to \$1,113,354.02 to reflect Plaintiff's contributory negligence. Plaintiff was subsequently awarded \$284,646.00 in costs and fees. *Williams v. Mele*, July 12, 2019.

Negligence of Third Party Driver Results in Defense Verdict for Ambulance Company

Plaintiff, a Nevada resident, was a passenger on a 2005 Jonway Scooter operated by a non-party driver, traveling on Boulder Highway. As the scooter entered the intersection of Boulder Highway and Sahara Avenue, it collided with Defendant's 2011 Ford E350 ambulance. Plaintiff alleged that Defendant's driver negligently caused the collision and failed to follow Defendant's policies and procedures. Defendant alleged that the driver of the scooter caused the collision.

Defendant called an accident reconstructionist and a toxicologist as expert witnesses. Plaintiff relied on the testimony of a pain management specialist to establish her alleged closed head injury and cervical, thoracic, and

lumbar spinal injuries. She alleged an unspecified amount in medical expenses. After sixteen days of trial, the jury deliberated for a little more than one hour before returning a verdict for Defendant. *Peterson v. Medicwest*, August 1, 2019.

MEDICAL MALPRACTICE

Defendant Did Not Fall Below the Standard of Care During Surgical Hysterectomy

On October 22, 2013, Defendant doctor performed a surgical hysterectomy on Plaintiff. Plaintiff alleged that, in 2014, she was advised by a non-party physician that her creatinine levels had increased, indicating distress to the kidney, and that her left kidney was enlarged. Plaintiff was allegedly diagnosed with hydroureteronephrosis, with an abrupt decrease in ureteral caliber four to five centimeters above the bladder trigone, requiring surgery.

Plaintiff asserted that Defendant fell below the standard of care during the initial surgery when he negligently stapled Plaintiff's ureter closed, and concluded the procedure without performing a cystoscopy and without removing the staples and clearing the ureters. Plaintiff was required to undergo corrective surgery, resulting in an allegedly long and painful recovery, and allegedly sustained permanent kidney damage. After an eight-day trial, the jury deliberated for three hours and unanimously found for Defendant. *Cicale v. Zak, M.D.*, August 28, 2019.

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NEVADA Legal Update

COMMENTS

In light of the closures and restrictions put in place due to COVID-19, jury trials in Nevada courts were suspended beginning March 14, 2020, after Governor Steve Sisolak declared a state of emergency. The Eighth Judicial District Court for Clark County, Nevada, has since established an extensive safety plan and protocol to allow trials to resume, and conducted one criminal jury trial in late September 2020.

The safety plan and protocol was developed based on the Center for Disease Control guidelines, along with input from Clark County, University Medical Center, the Nevada Division of Health and Human Services, and the Southern Nevada Health District. The plan includes air purification, rapid testing, social distancing measures, and Plexiglas partitions. Jurors, judges and

attorneys are to remain socially distanced, and the jury venire will consist of no more than 55 potential jurors.

Prospective jurors are to be provided information regarding the availability of a hardship deferral or excusal for reasons related to COVID-19. This deferral or excusal is potentially available to jurors who are considered high risk, including those over the age of 65 or who have an underlying medical condition. Prospective jurors are also provided an additional questionnaire including COVID-19 related questions to allow judges and counsel to pre-screen jurors for issues related to undue hardship or inability to serve.

When entering the courthouse, all jurors, witnesses and trial participants will be required to wear face coverings at all times, except when eating or drinking during breaks. Before entering the jury room, each

prospective juror will undergo a temperature screening and respond to questions about COVID-19 symptoms. Two courtrooms have been retro-fitted to create more space for social distancing, and Plexiglas physical dividers have been installed where necessary. Additional video monitors and microphones have been added, and all exhibits are to be submitted electronically. Any discussions outside the presence of the jury will be moved to an alternate location, and jury deliberations will occur in the courtroom or an adjacent courtroom, to maintain appropriate social distancing. No in-person spectators will be permitted in the courtroom, but a live video stream of trials will be available through the court's website.

At this time, criminal trials have been first priority. It has not yet been determined when civil jury trials may resume, but the earliest estimate is currently Spring 2021.