



# NEVADA Legal Update

Winter 2015

A l v e r s o n T a y l o r M o r t e n s e n & S a n d e r s • Nevada's Law Firm

## HIGHLIGHTS

### **A Homeowners Association May Foreclose on a Home, Extinguishing the Lender's Interest to the Property**

The Nevada Supreme Court determined that the Nevada Legislature intended to allow homeowners associations to non-judicially foreclose on common-interest properties if the homeowner was delinquent in paying association dues for nine months. This non-judicial foreclosure will extinguish the lending bank's interest on the property.

### **Courts Must Compare Expert Affidavit to the Allegations in the Complaint to Determine Compliance with Medical Malpractice Affidavit Requirements**

Nevada's District Courts must read the affidavit of a plaintiff's medical expert together with the allegations contained in the plaintiff's complaint to ensure that a medical malpractice action is filed in good faith and based upon competent expert medical opinion.

## NEVADA SUPREME COURT DECISIONS

### PROPERTY

### **A Nevada Homeowners Association May Foreclose on Property if a Homeowner is Nine Months Delinquent in Payment of Association Fees**

A dispute arose over a residence located in a common-interest community in Las Vegas, Nevada, which was subjected to Covenants, Conditions and Restrictions recorded in 2000. In 2007, the residence was encumbered by a note and deed of trust in favor of U.S. Bank. By 2010, the former homeowners had fallen delinquent on their homeowners association (HOA) dues and defaulted on their obligations to U.S. Bank. The HOA and U.S. Bank separately initiated non-judicial foreclosure proceedings.

SFR Investments Pool 1 (hereinafter "SFR Investments") purchased the property at the HOA trustee's sale on September 5, 2012. SFR Investments received and recorded a trustee's deed reciting compliance with all applicable notice requirements. In the meantime, the trustee's sale on U.S. Bank's deed of trust had been postponed to December 19, 2012. Days before the U.S. Bank sale was to occur, SFR Investments filed an action to quiet title and enjoin the sale. SFR Investments alleged that the HOA trustee's deed extinguished U.S. Bank's deed of trust and vested clear title in SFR Investments, leaving U.S. Bank with nothing to foreclose.

The district court denied SFR Investments' motion for a preliminary injunction and granted U.S. Bank's counter-motion to dismiss, finding that the HOA must judicially foreclose its superpriority lien. Because the HOA foreclosed non-judicially, U.S. Bank's first deed of trust survived the HOA trustee's sale and was senior to the deed SFR Investments received. SFR Investments appealed to the Nevada Supreme Court.

NRS 116.3116(1) gives an HOA a lien on a homeowner's residence for any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment, or fine becomes due. NRS 116.3116(2)(b) elevates the priority of the HOA lien over other existing liens except for a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent. The Supreme Court noted that if subsection (b) ended there, a first deed of trust would have complete priority over an HOA lien; however, the statute provides a partial exception:

The Homeowners Association lien is also prior to all security interests described in paragraph (b) to the extent of any [maintenance and nuisance - abatement] charges incurred by the association on a unit pursuant to NRS 116.310312, and to the extent of the assessments for common expenses [i.e., Homeowners Association dues] based on the periodic budget adopted by the association pursuant to NRS 116.3115, which would have become due in the absence of

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acceleration during the nine months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien.

NRS 116.3116(2). Thus, NRS 116.3116(2) splits an HOA lien into two pieces: a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

In Nevada, in order for an HOA to initiate foreclosure proceedings, it must notify the owner of the delinquent assessments. If the owner fails to pay within 30 days, the HOA may record a notice of default and election to sell. The homeowner must be given at least 90 days to pay the lien and if he fails to do so, the HOA may proceed to a foreclosure sale. Before the foreclosure sale, the HOA must give notice of the sale to the owner and to the holder of a recorded security interest if the security interest holder “has notified the association, before the mailing of the notice of sale of the existence of the security interest.” A deed reciting compliance with the applicable notice requirements is considered “conclusive” as against the property owner, his heirs and assigns, and all other persons. The sale, if conducted pursuant to the statutory requirements, vests “in the purchaser the title of the unit’s owner without equity or right of redemption.” NRS 116.3116(3).

U.S. Bank maintained that the statute merely created a payment priority between the HOA and the beneficiary of the first deed of trust. Thus, upon a foreclosure sale, the purchaser would be forced to pay the pre-existing HOA lien. The Nevada Supreme Court determined, however, that

the language of the statute provided that the superpriority piece of the HOA lien had true priority over a first deed of trust.

In support of its decision, the Nevada Supreme Court detailed the burdens of the HOA once a homeowner abandons his property. Revenue for an HOA is typically limited to common assessments, which makes its ability to foreclose on the unpaid dues portion of its lien essential. The holder of the first deed of trust may delay foreclosure on the vacant property, forcing the HOA to either increase the assessments for the remaining parcel owners or reduce the services provided to the association. The superpriority lien was created to avoid having the community subsidize security holders who delay foreclosure. As such, the HOA’s foreclosure should properly extinguish the lien of the otherwise first mortgage.

U.S. Bank maintained that it made little sense and was unfair to allow a relatively nominal lien, i.e. nine months of HOA dues, to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. The Nevada Supreme Court countered that as the junior lien holder, U.S. Bank could have resolved the HOA lien to avoid the loss of its security. In addition, U.S. Bank could have established an escrow for the HOA assessments to avoid having to use its own funds to pay delinquent dues.

Because NRS Chapter 116 permits a non-judicial foreclosure of HOA liens and because SFR Investments’ complaint alleged that proper notices were sent and received, the district court’s order of

dismissal was reversed. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Rep. 75 (2014).

## MEDICAL MALPRACTICE

### **In Medical Malpractice Actions, the District Courts Must Compare the Expert Affidavit to the Complaint to Determine Whether the Affidavit Satisfies the Statutory Requirements**

Plaintiff mother took her minor son to Defendant’s emergency room for injuries he sustained to his right middle finger from a parrot bite. Medical staff at the hospital irrigated Plaintiff’s wound, repaired it, then dressed and bandaged the finger. Several days later, Plaintiff returned to the same emergency room for a wound check. Plaintiffs allege the hospital staff only removed and reapplied the outer layer of the bandage, leaving the original wound dressing in place. Several days later, Plaintiffs returned to the same emergency department to have the dressing removed. According to Plaintiffs, the inner dressing had adhered to Plaintiff’s wound and the medical staff was required to soak the bandage in order to remove it. Once the bandage was removed, it was noted that Plaintiff’s finger was discolored and hospital staff requested consultation by two hand specialists. The specialists noted that Plaintiff’s finger was “dusky,” swollen and had “venous and arterial flow compromise.” Plaintiff underwent multiple surgeries, but eventually required a partial amputation of his finger.

Plaintiffs filed a complaint and asserted claims against the providers and their respective entities for medical malpractice, professional negligence and vicarious liability. Plaintiffs attached an expert affidavit, as required by NRS 41A.071. The affidavit stated that, to a reasonable degree of medical probability, the medical staff in the emergency department breached the standard of care when they dressed Plaintiff’s finger too tightly. Plaintiffs’

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medical expert chronologically described Plaintiff's treatment and summarized the relevant medical records and photos that were the basis of his opinions. The affidavit identified the allegedly negligent activities of several individuals, as well as the activities of "the staff of the emergency department." Plaintiff's expert noted that he required additional discovery to precisely implicate a single treatment date as having been more causative than the others. The affidavit did not identify the treating medical staff by name.

Defendants filed motions to dismiss Plaintiff's complaint, arguing that the affidavit of Plaintiff's medical expert was deficient because it did not specifically name the negligent parties. Plaintiff responded that, when the affidavit and complaint were read together, the affidavit properly supported all allegations contained in the complaint. The district court found that Plaintiff knew the identities and actions of Defendants, based on the medical records and as evidenced by their naming such parties in the complaint; however, Plaintiff's expert failed to identify either party by name or to address the medical care with any specificity within his affidavit. The district court granted the motions to dismiss and Plaintiff appealed.

The Nevada Supreme Court found that the district court erred in determining that the Plaintiff's expert affidavit was inadequate to support the allegations of medical malpractice. In reaching this conclusion, the Court looked to the language of NRS 41A.071, which required that a medical malpractice action be filed with "an affidavit, supporting the allegations contained in the action." The statute did not define the level of detail required to adequately support a plaintiff's allegations. The Nevada Supreme Court looked to other sources to assist in defining the word "support" and found varying definitions. Because the common definitions varied and the statute failed to define what level of support was required, the Court found the term to be ambiguous. The Court therefore

looked to the legislative history.

NRS 41A.071 was intended to address the medical malpractice insurance crisis in Nevada. The Nevada Legislature addressed the insurance crisis, in part, by capping noneconomic damages, requiring settlement conferences and creating the expert affidavit requirement set forth in NRS 41A.071. The statute was intended to "lower costs, reduce frivolous lawsuits and ensure that medical malpractice actions were filed in good faith based upon competent expert medical opinion." The Court therefore reasoned that NRS 41A.071 was enacted to deter baseless medical malpractice litigation, fast track medical malpractice cases, encourage doctors to practice in Nevada, and respect the injured plaintiff's right to litigate a case and receive full compensation for injuries. The Nevada Supreme Court therefore interpreted the expert affidavit requirements in a manner that conformed to reason and public policy, and thus continued to balance the interests of both the doctors and injured patients.

Plaintiff asserted that when the complaint and the affidavit were read together, it was clear that their medical expert was referring to the medical staff and their respective entities. Plaintiff further contended that the series of treatments made it impossible to name every medical provider responsible for treatment, but that Defendants received sufficient notice of the nature and basis of the claims against them. Defendants maintained that the expert affidavit failed to comply with the statute because it did not reference or attribute any negligent acts to an individual physician or individual.

The Nevada Supreme Court concluded that reason and public policy required the district courts read the complaint and the plaintiff's expert affidavit together when determining whether the expert affidavit met the requirements of NRS 41A.071. The Court was hesitant to adopt a strict interpretation, as encouraged by Defendants because at that preliminary point in the litigation, the parties had conducted little

to no formal discovery. The decision of the district court was reversed and remanded for further proceedings. *Zohar v. Zbiegien, M.D.*, 130 Nev. Adv. Rep. 74 (2014).

## NEVADA JURY VERDICTS

### PERSONAL INJURY

#### Decedent's Parents Denied Punitive Damages after Their Son's Death

The parents of a deceased, 13 year-old male brought suit for his wrongful death. Plaintiff alleged that Decedent was riding his bicycle to school and was crossing an intersection at the crosswalk. Defendant was allegedly stopped at the intersection and then negligently executed a right-turn, striking Decedent. Plaintiff further alleged that Defendant failed to immediately stop upon impact, but accelerated in an attempt to flee the scene. Decedent was reportedly dragged by Defendant's vehicle for 160 feet and succumbed to his injuries.

Plaintiff sought compensatory and punitive damages. After a nine day trial the jury awarded Plaintiff \$200,000.00 each for past and future pain and suffering, but found Decedent to be 30 percent at fault and Plaintiff's awards were reduced accordingly. The jury declined to award punitive damages. *Miller v. Fung*, July 24, 2014.

#### Defendant Appealed \$10,500.00 Arbitration Award and Reduced Plaintiff's Recovery to \$592.00

Defendant appealed Plaintiff's \$10,500.00 arbitration award and the case proceeded to a one day short trial. Plaintiff, a 25 year-old male, was operating an Isuzu Rodeo. Plaintiff alleged that while stopped near an intersection he was rear-ended by Defendant, a 21 year-old male, who was operating an Acura. Plaintiff claimed that the impact propelled his vehicle into the car

ahead of him and his Isuzu was determined to be a total loss. Defendant admitted negligence, but argued causation and damages. Plaintiff alleged cervical, thoracic and lumbar soft tissue injuries.

Plaintiff sought \$3,150.00 in medical expenses. Plaintiff served a \$7,212.50 pretrial offer of judgment and Defendant offered \$4,001.00. During closing arguments, Plaintiff's counsel asked the jury to award Plaintiff \$12,150.00, but defense counsel suggested that \$1,725.00 to \$2,225.00 was adequate compensation. Four jurors deliberated and awarded Plaintiff \$592.00 in compensatory damages. *Morale-Monroy v. Merino-Morales*, July 25, 2014.

### **Plaintiff Allegedly Sustained Injuries When a Pellet Gun Startled Him after Shattering his Sliding Glass Door**

Plaintiff was at his residence, sitting next to a sliding glass door. Defendants were allegedly playing with a Crossman Pumpmaster 760 Rifle and a pellet from the BB gun shattered Plaintiff's glass door. The shock of the blast reportedly caused Plaintiff to jolt or jump, and he sustained unspecified injuries. Plaintiff's spouse also asserted a loss of consortium claim. Defendants denied liability. Plaintiff sought compensatory damages and an unspecified amount for medical damages. After a four day trial the jury returned a verdict for the Defendants. *Selby v. Graham and Morena*, August 14, 2014.

## **MEDICAL MALPRACTICE**

### **Failure to Obtain Informed Consent Results in a \$190,280.00 Verdict**

Plaintiff, a 30 year-old Spanish speaking male, employed as a hotel maintenance worker, presented to a non-party medical center with complaints of a lump on the right side of his neck. Defendant, a physician's assistant, examined and diagnosed Plaintiff with a sebaceous cyst. Without the assistance of a Spanish

translator to explain the risks associated with the procedure, which included a risk of nerve damage, Defendant removed the cyst.

Plaintiff claimed that during the procedure, he experienced three separate episodes of an electric shock-like sensation, which originated at the surgical site and extended down his left arm. Defendant reportedly administered local anesthesia and continued with the procedure. Plaintiff alleged that as a result of Defendant's negligence, he sustained a complete transection of the spinal accessory nerve on the left side and has permanent loss of function of the eleventh cranial nerve. Plaintiff alleged that he was unable to lift his left arm beyond 90 degrees. Plaintiff sought \$53,280.00 in past medical expenses and \$12,000.00 in future medical expenses.

Plaintiff served a \$100,000.00 pretrial offer of judgment and Defendant offered \$50,000.00 on the day of trial. After a four day trial, the jury awarded Plaintiff \$190,280.00 in compensatory damages. *Uribe v. O'Donnell, PA-C*, June 27, 2014.

### **Teenage Plaintiff Awarded \$365,000.00 after Nose Job**

Plaintiff, an 18 year-old high school student, presented to Defendant otorhinolaryngologist for a septoplasty. Plaintiff alleged that Defendant fell below the standard of care when he failed to obtain her informed consent, fractured her nose and removed large portions of turbinate during the surgical procedure. Plaintiff called an otorhinolaryngologist to testify at trial, who opined that Defendant unnecessarily fractured Plaintiff's nose, performed an overly aggressive septoplasty and removed too much turbinate.

Defendant denied falling below the standard of care, and maintained that he obtained Plaintiff's informed consent and properly addressed Plaintiff's deviated septum. Defendant also argued that he removed the proper amount of turbinate and provided an open airway to better assist Plaintiff's breathing through her nose. Defendant's expert, an otorhinolaryngologist

and facial plastic surgeon, testified that it was necessary to fracture Plaintiff's nasal bones, and that the surgical procedure was properly performed.

Plaintiff alleged that as a result of Defendant's negligence, she sustained a "saddle nose" deformity. She also claimed that her nose membranes were dry and crusty and that her sense of smell and taste were diminished. Plaintiff alleged that she would require surgery to correct the deformity, and called another otorhinolaryngologist and plastic surgeon who testified that the cost of the future surgery would be \$25,000.00 to \$75,000.00. Defendant argued that Plaintiff was predisposed to the deformity and relied on an expert who testified he did not visualize a saddle nose deformity, but surgery to correct the alleged injuries would cost only \$15,000.00.

Plaintiff sought \$15,000.00 in past medical expenses, plus \$25,000.00 to \$50,000.00 in future medical expenses. Plaintiff made a pretrial demand of \$325,000.00 and Defendant offered \$20,000.00. After a six day trial, the jury returned a verdict for the Plaintiff for \$365,000.00. *Best v. Fine, D.O.*, July 14, 2014.

## **PREMISES LIABILITY**

### **Plaintiff with Diabetic Related Visual Disturbances Partially at Fault for a Slip and Fall**

Plaintiff, a 70 year-old retired male, alleged that while in the parking lot of Defendant hotel, he was injured when he tripped and fell over a curb. Plaintiff alleged that Defendant was negligent in its maintenance as a parking lot light was not functioning, resulting in inadequate illumination. Defendant maintained that there was adequate lighting in the parking lot and Plaintiff should have noticed the curb.

Defendant also noted that Plaintiff suffered from poor night vision secondary to the effects of diabetes and was not wearing

his glasses at the time of the alleged incident. Defendants relied on the testimony of an expert, who opined that Plaintiff's diabetes worsened his vision and affected his balance.

As a result of the alleged fall, Plaintiff sustained a shoulder rotator cuff tear. Plaintiff relied on the testimony of his treating physician, who opined that the non-surgical rotator cuff tear was casually related. Defendant's expert asserted that the rotator cuff tear was minor and may have been pre-existent.

Plaintiff sought \$9,000.00 in medical expenses and made a pretrial demand of \$250,000.00. Defendant hotel offered \$50,000.00 and Defendant maintenance company offered \$25,000.00. During closing arguments, Plaintiff asked the jury to award \$400,000.00 and Defense counsel argued liability. After a five day trial, the jury returned a \$100,000.00 verdict for Plaintiff, but found Plaintiff to be 49 percent at fault. Plaintiff's award was therefore reduced to \$51,000.00. *Campagnone v. Rio Properties & Yesco L.L.C.*, June 27, 2014.

### **Jury Finds for Defendant Hotel against a Patron Who Fell in the Hotel Lobby**

Plaintiff was visiting Las Vegas and was returning to her hotel room when she allegedly slipped and fell on a liquid substance on the lobby floor of Defendant hotel. Plaintiff alleged that Defendant was negligent in its maintenance of the premises and failed to warn of a dangerous condition. Plaintiff allegedly sustained cervical, thoracic and lumbar soft tissue injuries and injuries to her knee and ankle. Defendant argued that Plaintiff's complaints were related to her pre-existent condition, and not the alleged slip and fall.

Plaintiff sought compensatory damages in addition to an unspecified amount for medical expenses and lost wages. Plaintiff's spouse also asserted a claim for loss of consortium. After a five day trial, the jury returned a verdict for Defendant. *Kaufman v. New York Hotel and Casino*, August 29, 2014.

## **BREACH OF CONTRACT**

### **Plaintiff's Recovery Reduced Pursuant to Short Trial Rules**

Plaintiff began working for a subsidiary of Defendant's company, a non-party corporation, offering to sell to individuals wishing to incorporate in the State of Nevada. Even though Defendant was married, he began courting Plaintiff, alleging that his marriage to his wife was in name only. When Defendant advised Plaintiff that he was ready to move in with her, they began a physical relationship; however, in September 2008, Plaintiff attempted to end the relationship because Defendant had never formally left his wife. In November 2008, Plaintiff discovered she was pregnant, but Defendant was no longer interested in the relationship.

In January 2009, Defendant asked Plaintiff to quit her job with his company and she agreed. Defendant agreed to pay Plaintiff \$4,000.00 per month for child support and medical expenses. Plaintiff ended her employment on January 16, 2009 and Defendant made the payments as agreed. Plaintiff and Defendant's son was born on July 1, 2009. In September 2009, Defendant gave Plaintiff a 2007 Chevrolet Yukon, but never registered the vehicle or transferred title to the Plaintiff.

In November 2009, Defendant reduced the monthly child support payment to \$3,000.00, but paid for Plaintiff to move to Idaho so that she could rely on her family's support. In December 2009, Defendant started paying only \$940.00 per month and refused to pay any child support in March 2010. In April 2010, Plaintiff filed a motion for paternity testing and child support. Defendant was determined to be the father and was ordered to resume paying child support. Defendant then hired an agent to repossess the Chevrolet Yukon, which was repossessed at a convenience store where Plaintiff had stopped. Plaintiff's son was inside the vehicle and the repossession agent gave Plaintiff and her son a ride back

to their home.

On November 24, 2010, the family court ordered Defendant to pay \$995.00 monthly in child support, the first \$400.00 of licensed daycare expenses and one-half of daycare expenses in excess of that amount, not to exceed \$500.00. Defendant was also ordered to pay the first \$200.00 of any extracurricular activities and one-half of any additional extracurricular activities up to a maximum of \$300.00. Defendant was given limited legal custody and the right to receive medical, educational and religious information.

Plaintiff subsequently filed a breach of contract action against Defendant, based on his failure to transfer the registration and title of the Chevrolet Yukon to Plaintiff and failure to pay the \$4,000.00 in monthly child support. Plaintiff was subsequently awarded \$38,000.00 at arbitration, and Defendant appealed. The appeal was heard during a one day short trial.

Plaintiff alleged that Defendant was unjustly enriched when he deprived Plaintiff of her rights to the Yukon and converted Plaintiff's property. Additionally, Plaintiff alleged that Defendant's acts and omissions were undertaken with intent to deceive. After a one day trial jurors returned a verdict for Plaintiff and awarded \$332,000.00. The verdict was reduced to \$50,000.00 pursuant to Nevada's short trial rules. *Larson v. Hoskins*, June 20, 2014.

## **COMMENTS**

On November 4, 2014, Nevada voters approved Question One on the ballot, which allowed an amendment to Article 6 of the Nevada Constitution, creating a Nevada Court of Appeals. On November 5, 2014, the Nevada Commission on Judicial Selection accepted applications to fill the three seats on the newly created Appellate Court.

Prior to the November election, the Nevada Supreme Court heard all appeals from the Nevada district courts. The



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sheer volume of appeals created delays in resolution, sometimes taking as long as three years for an appeal to be heard and decided. The Nevada Supreme Court's caseload also affected the number of published opinions. Only four percent of recent decisions were resolved by published opinion, meaning that only four percent of recent Nevada Supreme Court decisions could be cited and relied on by the district trial courts, attorneys and the general public. The other 96 percent of Nevada Supreme Court decisions were in the form of an unpublished order, which only applied to the parties involved in the appeal.

Which matters will be heard by the newly created Appellate Court remains under the discretion of the Nevada Supreme Court. The Nevada Supreme Court will establish rules for the Appellate Court, but the Appellate Court will decide its own operating procedures. The Nevada Appellate Court is expected to start hearing

cases as early as January 5, 2015, in existing office space in Las Vegas and Carson City. Parties will continue to file appeals with the Office of the Supreme Court Clerk and the appeals will remain assigned to the Supreme Court until they are ready to be decided. The Nevada Supreme Court will maintain jurisdiction over cases that raise questions of first impression or issues of important public policy.

The Nevada Supreme Court has not yet specifically identified the types of cases that will be assigned to the Appellate Court, but it is anticipated that the Appellate Court will decide approximately one-third of all cases submitted to the Nevada Supreme Court, or approximately 700 cases per year.

Thirty-six applicants applied for the three available judicial seats on the Appellate Court. Following an interview process, the names of nine applicants were submitted to Nevada Governor, Brian Sandoval. On December 17, 2014, Governor Sandoval

appointed the first three Appellate Court Judges, who were all at the time serving as District Court judges. The Honorable Jerome Tao, who was appointed to the first seat, has served as an Eighth Judicial District Court judge in Clark County, Nevada, since being appointed by Governor Sandoval in 2011. Judge Tao was recently reelected to the bench in November. The Honorable Michael Patrick Gibbons has served as a judge in the Ninth Judicial District Court for Douglas County since being elected in 1994, and was appointed to the second appellate seat. The Honorable Abbi Silver was appointed to the third seat. Judge Silver served in the Las Vegas Municipal Court, Las Vegas Township Court and Justice Court before being elected to the Eighth Judicial District Court in 2009. These three judges will serve until the 2016 election. Once elected, Appellate Court judges will serve six year terms.