



NEVADA Legal Update

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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 • N e v a d a ' s L a w F i r m

HIGHLIGHTS

Award of Attorney Fees and Costs Not Required Based on Offer of Judgment in Arbitration Proceeding

Defendant's post-award motion for attorney fees and costs was properly denied even though Defendant served two statutory offers of judgment prior to arbitration. The Court held that Defendant failed to demonstrate that the arbitration panel manifestly disregarded Nevada law.

Defendant Receives a Favorable Jury Verdict after Trying Case Three Times

After a mortgage company raised the interest rate on a loan just before closing of escrow, Plaintiff sued for breach of contract and deceptive trade practices, claiming "bait and switch." He was awarded more than \$1,000,000.00 in punitive damages after the first trial and \$675,000.00 in punitive damages after the second. After successful appeals, however, the jury ultimately found for Defendant.

Nevada Supreme Court Upholds Cap on Noneconomic Damages in Medical Malpractice Cases

Following the death of a diabetic patient, a medical malpractice action was filed and Nevada's statutory cap on noneconomic damages, NRS § 41A.035, was challenged. The Nevada Supreme Court held that the cap was constitutional, limited awards for professional negligence as well as medical malpractice cases, and confirmed that the cap applies to the entire claim instead of individual plaintiffs or defendants.

NEVADA SUPREME COURT DECISIONS

ARBITRATION

Award of Attorney Fees and Costs Not Required Based on an Offer of Judgment in Arbitration Proceeding

Vegas VP, LP hired WPH Architecture, Inc. to perform architectural services for a condominium project that Vegas VP was building in Las Vegas. After a dispute arose relating to the architectural services provided by WPH, Vegas VP brought an action against WPH for professional negligence. The contract between the parties provided that any disagreement would be resolved with binding arbitration before the American Arbitration Association (AAA).

Prior to arbitration, WPH served two statutory offers of judgment. Vegas VP rejected both. After an AAA panel of arbitrators ruled in WPH's favor, WPH filed a post-award motion for costs, fees, and interest. The arbitration panel denied the motion, reasoning that because no case law existed which provided express authority to grant fees and costs incidental to a declined offer of judgment in an arbitration proceeding, they were disinclined to rule in WPH's favor.

On appeal to the Nevada Supreme Court, WPH argued that the arbitration panel manifestly disregarded NRCP 68, NRS § 17.115, and NRS § 18.020, which provide that a party who served an offer of judgment that its adversary does not improve upon will recover the reasonable

attorney's fees and costs it incurs after making the offer.

In rendering its decision, the Nevada Supreme Court noted that the contract between the parties had two choice of law provisions, the AAA rules and laws of the State of Nevada. Relying on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court concluded that the agreement was substantially governed by Nevada law and procedurally governed by the AAA rules. 514 U.S. 52 (1995). The Court then held that NRCP 68, NRS § 17.115, and NRS § 18.020 were substantive laws, but Nevada law was silent as to whether these provisions applied to private arbitration proceedings.

In holding that NRCP 68, NRS § 17.115, and NRS § 18.020 did not require an arbitrator to award attorney fees or costs, the Court found that the laws did not include any reference to arbitration. Thus, the plain language of the statutes did not expressly require an award of fees and costs after an arbitration proceeding. Likewise, no Nevada case law existed holding that these laws applied to arbitration. Because

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“no clear authority existed in Nevada that would require the award of attorney fees and costs in an arbitration proceeding,” the Court held that WPH had failed to demonstrate that the arbitration panel manifestly disregarded Nevada law. *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. Adv. Op. 88 (November 2015).

PROPERTY

Debtors Cannot Escape Deficiency Judgments after a Foreclosure Sale

Michael and Sherry Munoz borrowed money from Colonial Bank and granted a security interest in their real property. The bank was placed into a receivership by the Federal Deposit Insurance Corporation (FDIC), and the Munozes' loan was assigned to Branch Banking and Trust (BB&T). A year later, NRS § 40.459(1)(c) was enacted, which limited the amount recoverable by an assignee creditor from a deficiency judgment.

In 2012, the Munozes defaulted on their loan and BB&T instituted an unopposed action for a judicial foreclosure of the Munoz property. Because the property was sold for less than the value of the outstanding loan, BB&T filed a motion seeking a deficiency judgment for the remaining balance. The district court held that, because the loan originated and was assigned prior to the enactment of NRS § 40.459(1)(c), the statute did not retroactively apply and BB&T was entitled to the remaining balance. The Munozes appealed.

On appeal, the Nevada Supreme Court did not address whether application of NRS § 40.459(1)(c) would apply retroactively. Instead, the Court first addressed whether NRS § 40.459(1)(c)'s limitation on the amount of a deficiency judgment recoverable by a successor creditor was preempted by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The Nevada Supreme Court began its analysis with a discussion of the Supremacy Clause stating that federal

law preempts state law when the two conflict. A conflict arises when the state law “frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created.” *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).

Congress created FIRREA to assist the nation's banks and saving institutions from their declining financial condition. Under FIRREA, when the FDIC is appointed as the receiver of a failed institution, it becomes the receiver of all the institution's assets, which they must try to convert to cash to cover the insured depositors. Federal law has created a special status for FDIC's assignees to maintain the value of the assets they receive from the FDIC. Thus, FIRREA's purpose is to facilitate the transfer of assets of failed banks to other institutions.

NRS § 40.459(1)(c) limits the amount an assignee creditor may recover on a deficiency judgment, subtracting the amount of the secured property's actual value from the amount that it paid to acquire the interest in the secured debt. Therefore, a successor creditor's recovery cannot be more than it paid for the loan, which prevents a creditor from realizing a profit on its purchase of a debt.

Based on this legislative intent, the Nevada Supreme Court held that NRS § 40.459(1)(c) was preempted by FIRREA, as NRS § 40.459(1)(c) limits the market for assets transferred by the FDIC, which frustrates the purpose of FIRREA. Without considering any other arguments, the Nevada Supreme Court therefore affirmed the district court's decision requiring the Munozes to pay the remaining balance of the loan. *Munoz v. Branch Banking and Trust Co., Inc.*, 131 Nev. Adv. Op. 23 (April 2015).

NEVADA JURY VERDICTS

PERSONAL INJURY

Defendant Restaurant Liable for Wire in Hash Browns

Plaintiff was a patron at Defendant Tinoco's Kitchen, where he ordered breakfast. As he consumed some hash brown potatoes, he allegedly swallowed a wire, then vomited, which included some blood in the sputum. Tinoco's Kitchen denied liability, asserting that Third-Party Defendant U.S. Foodservice distributed defective hash brown potatoes, containing the approximately one-and-one-half-inch long metal wire. U.S. Foodservice denied liability, maintaining that there was no evidence that the wire came from any of the food products it delivered.

Plaintiff required medical removal of the wire from his esophagus. Plaintiff alleged that he endured intense throat pain for approximately five months, sustained emotional trauma from vomiting blood in a public place, and as a result of the incident, was unable to sleep or engage in intercourse. After a one day trial, the jury found Defendant Tinoco's Kitchen 100 percent liable and awarded Plaintiff \$33,000.00 in compensatory damages. *Cutler v. Tinoco's Kitchen*, May 29, 2015.

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Verdict for Minor Plaintiff after Field Hockey Injury

Plaintiff, age 11, was injured while participating in a game of field hockey during a mandatory physical education class. Prior to permitting the students to play, Plaintiff's physical education teacher explained some of the rules of field hockey. Plaintiff's teacher then supervised the game. During the game, another student lifted his hockey stick to strike the ball and struck Plaintiff in the head and left eye. The school nurse informed Plaintiff's mother that medical attention was not necessary, but Plaintiff was admitted to UMC two days later for head pressure, left eye hyphema with associated increased intraocular pressure, and corneal blood staining, which resulted in an anterior chamber washout.

Plaintiff alleged that the Clark County School District was negligent when it failed to provide helmets, face protectors, safety glasses, or other safety equipment for a physical education class where students were required to participate in field hockey. The school district denied liability, advancing the defense that safety equipment was not required. Defendant also argued that Plaintiff's injury was a risk inherent in the sport of field hockey and Plaintiff assumed the risk. After a five day trial, the jury awarded Plaintiff \$60,288.06 in compensatory damages. The court reduced the award to \$50,000.00. The school district has appealed the verdict.

Verdict for Plaintiff Reduced by Comparative Negligence

Plaintiff, a 44-year-old pedestrian, was struck in a crosswalk by an employee driver of Defendant Elko Floral. Plaintiff alleged that Defendant's driver was inattentive and failed to decrease the vehicle's speed when approaching an intersection known to be busy with heavy pedestrian traffic. Defendant denied liability, advancing the defense that Plaintiff "darted out" in front of Defendant's driver.

Plaintiff allegedly suffered a closed head injury, with residual brain damage; a fractured pelvis; and two spinal fractures. Plaintiff claimed medical expenses in excess of \$80,000.00 and an unspecified amount for lost wages. Plaintiff served a \$120,000.00 pretrial offer of judgment and Defendant served a \$10,000.00 offer of judgment. After a four day trial, the jury returned a verdict for Plaintiff, awarding \$300,000.00 in compensatory damages. The jury found Plaintiff to be 49 percent at fault, thus reducing Plaintiff's award to \$153,000.00. *Gallio v. Elko Floral Division of D.E.W., Inc.*, January 16, 2015.

Verdict Against Defendant Who Drove on the Wrong Side of the Road

Plaintiff, a 25-year-old restaurant manager, was operating a 2005 Chevrolet Malibu. Plaintiff was stopped in the driveway of non-party Suncoast Hotel and Casino's parking garage, attempting to execute a right westbound turn. Plaintiff alleged that she collided with Defendant's 2004 Nissan Pathfinder Armada as she exited the driveway. Plaintiff claimed that eastbound and westbound traffic were divided by a center landscaped median, and Defendant was traveling on the wrong side of the road. Defendant denied liability, asserting that Plaintiff caused the collision when she failed to stop for the posted stop sign at the end of the exit ramp, failed to look both ways prior to proceeding, and failed to yield the right-of-way to through traffic.

Plaintiff allegedly sustained cervical, thoracic, and lumbar soft tissue injuries. She claimed \$125,018.92 in medical expenses and \$4,323.60 in lost wages. After a seven day trial, the jury awarded Plaintiff \$1,879,342.52 in compensatory damages. Plaintiff was found to be five percent at fault and her award was reduced to \$1,785,375.39. *Milner v. Wilson*, February 6, 2015.

Defense Verdict in Products Liability Action

Plaintiff, a 33-year-old physician, was struck in the upper shoulder and neck when a gust of wind allegedly blew the bed cover off of a pick-up truck parked next to where Plaintiff was standing. Plaintiff alleged that the cover was a SnugTop SnugLid, manufactured by Defendant Custom Fibreglass Manufacturing and sold by Defendant Schrodt Enterprises. The owner of the pick-up truck testified that he fully attached the cover to the truck bed, and did not know how the cover became detached.

Plaintiff alleged the bed cover was negligently designed and the Defendants failed to properly warn consumers. Defendants denied liability, advancing the defense that the cover was properly designed and no additional warnings were needed. Defendants argued the possibility of the cover blowing off was obvious. Further, the bed cover was "wind" tested and did not detach in winds in excess of 65 miles-per-hour. Approximately 250,000 bed covers had been sold with no other reported incidents. Defendants also argued that the incident would not have occurred unless the owner of the pickup truck failed to properly attach the cover to his vehicle.

Plaintiff alleged several cervical fractures, which resulted in paralysis, and an exacerbation of her preexistent Crohn's disease. After rehabilitation, Plaintiff regained the ability to walk and was able to return to her employment. Plaintiff made a \$15 million pretrial demand and Defendants jointly served a \$3.45 million offer of judgment. During closing arguments, Plaintiff asked the jury to award her \$44,302,770.00 and Defendants contested liability but suggested \$6,269,269.00 was adequate compensation in the event liability was established. After a 26 day trial, the jury found for Defendants. *Hassanali v. Custom Fibreglass Manufacturing Co.*, February 11, 2015.

Verdict for Plaintiff after Collision with an Ambulance

Plaintiff was operating a motorcycle with a group of other motorcycle riders, traveling westbound on Charleston Boulevard. Defendant's driver, operating an ambulance, was initially traveling westbound on Charleston Boulevard, following Plaintiff. Plaintiff alleged that Defendant's driver subsequently elected to travel westbound on Charleston Boulevard in the eastbound traffic lanes. As both parties approached Town Center Drive, Defendant's driver allegedly executed an abrupt turn across the westbound travel lanes in an effort to proceed northbound on Town Center Drive. Plaintiff was unable to stop and collided with Defendant's ambulance. Defendant, American Medical Response, denied liability, maintaining that the ambulance's sirens and lights were in operation, and Plaintiff failed to yield the right-of-way.

Plaintiff allegedly suffered extensive injuries including a concussion, annular tears, a bulging disk, and neuroforaminal narrowing and secondary headaches. Plaintiff also alleged he suffered bilateral numbness and memory problems. After a ten day trial, the jury awarded Plaintiff \$1,349,848.20 in compensatory damages, which was reduced to \$1,214,863.38 after Plaintiff was found to be ten percent at fault. *Sullenberger v. American Medical Response*, March 27, 2015.

MEDICAL MALPRACTICE

Defense Verdict after Complications with Breast Reduction

Plaintiff, a 66 year-old Nevada resident, underwent surgery to reduce the size of her breast implants, performed by Defendant plastic surgeon. Plaintiff subsequently filed a medical malpractice suit against Defendant physician alleging that he fell below the standard of care during the multiple follow up visits where Defendant failed to recognize and treat the deteriorating

condition of Plaintiff's breasts. Plaintiff also claimed that Defendant misinformed her that her recovery was "going smoothly" when in fact Plaintiff's condition worsened.

Defendant denied falling below the standard of care. He asserted that Plaintiff had been advised that she was at high risk for multiple complications and he recommended against surgery. Defendant also claimed that he was not aware of Plaintiff's previous surgical breast procedures and only agreed to perform the surgery after extensive informed consent. Moreover, Plaintiff cancelled follow-up appointments after the surgery against medical advice. Defendant argued that had Plaintiff continued medical treatment she would have had an optimal outcome. A plastic surgeon was called as an expert witness and opined that Defendant met the standard of care. After a five day trial, the jury found for Defendant. *Berton v. Ebert*, M.D., June 19, 2015.

Alleged Failure to Diagnose Results in Defense Verdict

Plaintiff, a Nevada visitor, presented to non-party hospital's emergency department with a complaint of dizziness. Plaintiff was examined and lab testing was performed, revealing an abnormal sodium level. Plaintiff reported consuming a large amount of water. Non-party emergency medicine specialist suspected water poisoning and discussed this concern with Defendant, the on-call physician. Shortly thereafter, the laboratory results indicated a critical sodium value.

Defendant ordered the continued administration of sodium chloride and 500 ml of potassium chloride. Defendant also ordered that Plaintiff's electrolytes be checked every eight hours for 24 hours to confirm that the sodium level was improving. After Plaintiff's sodium level improved, the sodium chloride was discontinued. An MRI was then taken and Plaintiff began physical therapy. The physical therapist noted that Plaintiff was dizzy and had difficulty in tandem standing and single leg stance.

Plaintiff alleged that Defendant fell

below the standard of care when he failed to diagnose and treat Plaintiff for hyponatremia, and improperly prescribed hypertonic saline. Plaintiff also alleged that Defendant raised Plaintiff's sodium levels too fast and failed to diagnose metabolic abnormalities indicated on the MRI. Finally, Plaintiff alleged that Defendant failed to obtain Plaintiff's informed consent regarding the risks associated with hypertonic saline. After a 12 day trial, the jury found for Defendant. *Lee v. Ellis*, M.D., April 21, 2015.

PREMISES LIABILITY

Verdict for Plaintiff for Injuries Sustained While Using Trampoline

Plaintiff, age 15, alleged that while she was a patron of Defendant gymnastics facility, a trampoline bed split open as a result of its age, causing Plaintiff to strike the floor below the trampoline. Plaintiff allegedly sustained a closed head injury, with mild traumatic brain damage and headaches; a laceration to the chin; a contusion to the elbow; a bruised and bloody knee; and an injury to her hand. Defendant denied liability, arguing that it had no prior notice of any issue with the trampoline. Defendant also argued that Plaintiff was a straight A student and there was no evidence of brain damage or ongoing medical issues related to the incident. Defendant maintained that Plaintiff only suffered a minor laceration on the chin and mild headaches, which largely resolved.

Plaintiff made a pretrial demand of \$75,000.00 and Defendant offered \$40,000.00. During closing arguments, Plaintiff's counsel asked the jury to award more than \$1,000,000.00 for past and future medical expenses and pain and suffering. After a five day trial, the jury awarded Plaintiff \$60,000.00 in damages. *Downey v. Gym Cats West, Inc.*, May 22, 2015.

Defendant Liable for Slip and Fall

While a patron at Defendant's restaurant, Plaintiff allegedly slipped and fell on salad dressing on the floor. Plaintiff filed suit against Defendant, alleging that Defendant failed to have sufficient safety policies in place to ensure that spills were prevented, found, and cleaned.

At trial, Plaintiff relied on a safety engineer who opined that Defendant did not meet safety standards. Defendant denied liability, advancing the defense that Plaintiff might have tripped rather than slipped.

As a result of the fall, Plaintiff allegedly sustained a closed head injury, with residual brain damage; injuries to her wrist; and spinal injuries. A neurologist and a neuropsychologist both testified that Plaintiff had sustained brain damage. Plaintiff made a pretrial demand for \$333,000.00 and Defendant offered \$200,000.00. After a nine day trial, the jury awarded Plaintiff \$937,891.00 in compensatory damages. *Reimann v. Firefly Partners, LLC*, June 6, 2015.

BREACH OF CONTRACT

Jury Verdict for Defendant Following Two Successful Appeals

Plaintiff, a 35 year-old computer networking specialist, and his fiancée, purchased a home. Plaintiff alleged that, prior to close of escrow, the interest rate on his mortgage had been "locked in" at 4.625%. At closing, with Plaintiff's furnishings on the moving truck, Defendant raised the interest rate to 6.5%. Plaintiff accused Defendant of performing a "bait and switch" on the interest rate, which increased Plaintiff's mortgage payments from \$400 to \$500 per month. Defendant denied liability, maintaining that Plaintiff was only conditionally approved for the loan and argued that because Plaintiff cancelled the transaction, any liability was negated.

The case was tried and Plaintiff was

awarded \$53,727.00 in compensatory damages and \$1,542,500.00 in punitive damages. Defendant appealed the verdict and the Nevada Supreme Court remanded the case to the district court for further proceedings. The second trial resulted in an award for Plaintiff of \$675,000.00 in punitive damages. Again, Defendant appealed and the Nevada Supreme Court reversed the verdict and remanded the case to the trial court. Prior to the third trial, Plaintiff served a \$550,000.00 offer of judgment and Defendant responded with a \$150,000.00 offer.

During closing arguments, Plaintiff argued that the previous jury findings were appropriate and Defendant's fraudulent conduct would continue unless punitive damages were awarded. Defendant argued that its conduct was justifiable and that Plaintiff was being greedy. The jury found for the Defendant on the issue of punitive damages. *Betsinger v. DHI Mortgage Co., LTD.*, June 19, 2015.

Verdict for Plaintiff on Bad Faith Claim

Plaintiff's vehicle was struck by an uninsured motorist who executed an unsafe lane change. Plaintiff filed a claim with Defendant insurance carrier for uninsured motorist coverage, but Defendant denied the claim. Plaintiff subsequently filed suit claiming that Defendant breached the contract and the covenant of good faith and fair dealing by failing to pay the uninsured motorist benefits. Plaintiff obtained a \$22,600.00 arbitration award and Defendant appealed to the district court.

Plaintiff allegedly sustained cervical, thoracic, and lumbar soft tissue injuries as a result of the accident, including secondary headaches that required treatment for two months. Plaintiff requested \$10,600.00 in medical expenses. She served a \$19,999.00 pretrial offer of judgment, but Defendant refused to make an offer. At trial, Plaintiff asked the jury to award her \$22,600.00. The jury returned a verdict for Plaintiff and awarded \$45,600.00 in compensatory damages. *Damasco v. State Farm*, May 22, 2015.

COMMENTS

The Nevada Supreme Court Upholds Cap on Noneconomic Damages in Medical Malpractice Cases

In a unanimous decision, the Nevada Supreme Court recently upheld as constitutional NRS § 41A.035, which limits noneconomic recovery in medical malpractice or professional negligence lawsuits to \$350,000.00. NRS § 41A.035 was enacted in 2004 in response to the overwhelming support of Nevada voters for the ballot measure "Keep Our Doctors in Nevada." At that time, the number of medical malpractice cases had increased and the cost of liability insurance for physicians in Nevada was more than double that of doctors in other states. Since the statute was enacted, there has been conflict within the district courts as to how this statute should be specifically applied.

In *Tam v. Eighth Judicial District Court*, 131 Nev. Adv. Op. 80 (October 2015), Charles Thomas Cornell, Jr., a diabetic, died when he was unable to obtain insulin. An action for professional negligence and medical malpractice was filed against Mr. Cornell's healthcare providers, alleging that after receiving care from the Defendants, Mr. Cornell was discharged without medications or prescriptions for essential medications, including insulin.

Pursuant to NRS § 41A.035, Defendant Stephen Tam, M.D. filed a motion *in limine* requesting that Plaintiff's noneconomic damages be limited to \$350,000.00. The district court denied Dr. Tam's motion based on three separate findings: (1) NRS § 41A.035 unconstitutionally infringed on the right to trial by jury; (2) a separate cap of \$350,000.00 applied to each plaintiff for each of the defendants; and (3) NRS § 41A.035 did not apply to medical malpractice claims. Dr. Tam sought relief from the Nevada Supreme Court.

The Nevada Supreme Court held that NRS § 41A.035 does not interfere with the right to a jury trial because the law takes effect only *after* a jury has made its



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assessment of damages. The Court had previously noted that a jury's duty is to make factual findings, while the determination of the legal consequences for such findings "is a matter for the [L]egislature." *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 820 (1997). The trial court therefore erred in determining the statute violated this right.

The Supreme Court also addressed Plaintiff's argument, first raised on appeal, that NRS § 41A.035 violates the Equal Protection Clause. The Court cited its previous decision in *Barrett v. Baird* and reaffirmed that medical malpractice claims undergo rational basis review. 111 Nev. 1496, 1500 (1995). The Court looked to the legislative intent behind NRS § 41A.035 and noted that the statute's express goal to "stabilize Nevada's health care crisis and provide protection for both doctors and patients" was rationally related to a legitimate government interest and did not violate the Equal Protection Clause.

The Supreme Court further held that the \$350,000.00 cap "applies per

incident, regardless of how many plaintiffs, defendants, or claims are involved." The Court conceded that the statute's use of the term "action" was ambiguous and could be reasonably interpreted as both parties claimed. In reaching a decision, the Court again relied on the statute's legislative history, which included a comparison to California's analogous cap on noneconomic damages.

Finally, the Supreme Court addressed the relationship between professional negligence and medical malpractice. In concluding that professional negligence encompasses medical malpractice, thus holding that NRS § 41A.035 applies to medical malpractice cases, the Court cited legislative history that used the terms "professional negligence" and "medical malpractice" interchangeably. The Court also noted that the Nevada Legislature "has since clarified this confusion [between professional negligence and medical malpractice] by striking the term 'medical malpractice' in NRS Chapter 41A and

replacing those references with the term 'professional negligence.'"

The Supreme Court's interpretation of NRS §41A.035 should seemingly resolve the issue regarding the application of the statute and limit any award of noneconomic damages for alleged medical malpractice to a total \$350,000.00. However, plaintiff attorneys are already looking for ambiguity in the Court's order. Specifically, some plaintiffs now suggest that the reference to the cap applying "per incident" indicates they can recover a separate award for each "incident" of malpractice, such as cases involving the death of multiple patients, i.e. a mother and deceased infant. As the Supreme Court's decision was only recently issued in October 2015, it is unclear how the trial courts will address these new issues. Given the plain language of the decision, however, we expect the district courts to enforce the single award of \$350,000.00 in noneconomic damages.