Alverson Taylor Mortensen & Sanders
Nevada's Law Firm

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Legal Update

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Alverson Taylor Mortensen & Sanders • *Nevada's Law Firm*

Highlights

Medical Records are Not Necessary to Prove a Claim for Intentional Infliction of Emotional Distress

The Nevada Supreme Court held that when a defendant's alleged conduct is extreme, less evidence of the plaintiff's physical injury is necessary to succeed on a claim for intentional infliction of emotional distress.

Award for Plaintiff in Claim Against Casino Nightclub

As a result of an incident involving nightclub security, Plaintiff filed a claim alleging assault, battery, intentional infliction of emotional distress, and false imprisonment. The jury awarded $160,500,000.00 in compensatory damages.

Nevada to Lose Two Supreme Court Justices in January 2019

Chief Justice Michael Cherry and Justice Michael Douglas announced plans to retire at the end of their terms in January 2019.

Nevada Supreme Court Decisions

Damages / Emotional Distress

Testimony May Be Sufficient to Establish Intentional Infliction of Emotional Distress

Plaintiff Gilbert Hyatt filed a lawsuit against Defendant Franchise Tax Board of the State of California ("FTB") for various intentional torts and bad faith committed by FTB auditors during audits of Hyatt's 1991 and 1992 state tax returns. Based on Plaintiff's lucrative computer-chip patent and the large sums of money he generated, Defendant decided to review Plaintiff's 1991 state income tax return. Plaintiff alleged that Defendant conducted unfair audits "seeking to trump up a tax claim against him or attempt[ing] to extort him," that Defendant's audits were "goal-oriented," that the audits were conducted to improve Defendant's tax assessment numbers, and that the penalties Defendant imposed against Plaintiff were intended "to better bargain for and position the case to settle."

Specifically, among the intentional torts Plaintiff alleged, was the tort of intentional infliction of emotional distress ("IIED"). During discovery, Plaintiff refused to disclose his medical records. As such, Plaintiff was precluded at trial from presenting any medical evidence of severe emotional distress. Regardless, Plaintiff presented "evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in [Plaintiff's] behavior and health during the audits." Based on Plaintiff's testimony at trial, the jury returned a special verdict awarding damages in the amount of $82 million on Plaintiff's emotional distress claim.

To prove IIED, the plaintiff must prove: "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation. *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998). A plaintiff must set forth "objectively verifiable indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Id.*

Defendant appealed the verdict, arguing that Plaintiff failed to establish he actually suffered severe emotional distress because he failed to provide medical evidence or objectively verifiable evidence. On appeal, the Nevada Supreme Court specifically

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adopted the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable means of proving "that severe emotional distress was suffered for the purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered." Medical records are not mandatory to establish a claim for IIED if the alleged acts of Defendant are sufficiently severe.

The Nevada Supreme Court found Plaintiff's evidence, including his own testimony, was sufficient to meet this burden, and upheld the jury's verdict in favor of Plaintiff. *Franchise Tax Bd. of Cal. v. Hyatt, 133 Nev. Adv. Op. 57* (September 2017).

Premises Liability

Innkeepers are Liable for Injuries Caused by Third Parties Where the Injury is Foreseeable.

Plaintiffs Carey Humphries and Lorenzo Rocha filed a lawsuit against Defendant New York-New York Hotel and Casino, after they allegedly sustained injuries during a physical altercation that occurred on Defendant's casino floor. On the morning in question, Plaintiff Humphries was attacked by another casino patron. Plaintiff Rocha attempted to intervene and was also hit by that patron. One of Defendant's security guards responded and immediately reported the altercation over his radio. The security guard then watched the attack for twelve to fifteen seconds until backup arrived before intervening. Plaintiffs filed a complaint against Defendant alleging that Defendant was liable for the injuries they sustained.

Defendant moved for summary judgment arguing that it did not owe Plaintiffs a duty of care. The trial court granted summary judgment pursuant to NRS 651.015, finding that Defendant had no "notice or knowledge" that the other patron would assault Plaintiffs. Plaintiffs appealed.

NRS 651.015(a) states that innkeepers owe a duty of care for on-premises injuries caused by third parties when "[t]he wrongful act which caused the death or injury was foreseeable." NRS 651.015(a). To determine whether an innkeeper owes a duty under NRS 651.015(2)(a), the Nevada Supreme Court conducted a foreseeability analysis under both NRS 651.015(3)(a) and (b). NRS 651.015(3) provides that an incident may be foreseeable in two distinct ways:

- The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or
- Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

NRS 651.015(3)(a)-(b). In interpreting NRS 651.015(3)(a), the Nevada Supreme Court held "that the circumstances surrounding the commission of a wrongful act may provide the requisite foreseeability for imposing a duty." The Court further explained that the proper analysis under NRS 651.015(3)(a) is similar to a totality of the circumstances approach. As such, circumstances regarding the basic minimum precautions that are reasonably expected to be taken by an innkeeper are to be considered. The Court noted that evaluating foreseeability for imposing a duty on innkeepers must be done on a case-by-case basis. The factors the district court should have considered included the amount of security on the premises, the length of time it took for security to intervene, and that no security audit was completed.

With regard to NRS 651.015(3)(b), the Nevada Supreme Court held that when determining whether prior wrongful acts are sufficiently similar, a similar occurrence requires only general likeness, not factual conformity. The Court found that Defendant was aware of numerous similar incidents occurring on the casino floor. As part of its motion for summary judgment, Defendant produced incident reports detailing on-premises assaults and batteries throughout the year. Although these prior wrongful acts did not occur in the exact location on the casino floor where Plaintiffs were attacked, Defendant documented numerous prior incidents involving physical altercations that were sufficiently similar. The Court additionally found that the district court's analysis of whether prior wrongful acts were sufficiently similar did not consider, among other things, the location, the level of violence and security concerns implicated between the wrongful act in the lawsuit and any prior wrongful acts on the premises.

Ultimately, the Nevada Supreme Court held that pursuant to NRS 651.015(3)(b) Defendant owed a duty of care to Plaintiffs and that Plaintiffs' injuries were foreseeable. As such, the Nevada Supreme Court reversed the district court's decision granting summary judgment. *Humphries v. New York-New York Hotel and Casino, 133 Nev. Adv. Op. 77* (October 2017).

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NEVADA JURY VERDICTS

Personal Injury

Plaintiff Awarded $934,552.28 in Multi-Vehicle Rear-End Collision Caused by Motorhome

Plaintiff, a 68 year-old male operating a 2004 Ford Ranger pickup truck, alleged that while he was stopped in traffic, he was rear-ended by Defendant, a male operating a 1998 Roadmaster motor home. Plaintiff claimed Defendant was speeding and left 79 feet of skid marks. Plaintiff's vehicle was propelled forward into the vehicle in front of him.

As a result of the collision, Plaintiff alleged injuries to his cervical, thoracic, and lumbar spine. At trial, Plaintiff relied on the testimony of a radiologist and neuropsychologist. Plaintiff sought $103,826.14 in past medical expenses and $1 million in future medical expenses.

Prior to trial, Plaintiff made a pretrial demand of $1 million. Defendant offered $17,500.00. At trial, Plaintiff asked the jury for $103,826.14 in past medical expenses and a fair amount for pain and suffering. Defense suggested $9,000.00 for medical expenses and $10,000.00 for pain and suffering was adequate. After a seven-day trial and two hours of jury deliberation, the jury found for Plaintiff and awarded him $934,552.28. *Carillo v. Kampf*, March 21, 2017.

Defense Verdict for Bus Driver After Sideswipe Incident

Plaintiff was operating a Tesla and alleged Defendant, a male shuttle bus driver operating his shuttle bus in the course and scope of his duties, sideswiped Plaintiff's vehicle. Plaintiff sustained unspecified injuries. Plaintiff's automobile insurance company, State Farm, also sought an unspecified amount for property damage. The matter initially proceeded through arbitration and Plaintiff made a $13,000.00 settlement demand. State Farm served a $7,050.00 offer of judgment. Defendants denied liability, claiming Plaintiff caused the accident, and refused to make an offer.

After an arbitration decision in favor of Defendants, Plaintiffs appealed. At the short trial, Plaintiff asked the jury for $6,500.00 in medical expenses, plus $15,000.00 for pain and suffering. Plaintiff State Farm asked the jury for $14,191.00 in property damage. Defendants argued liability. After only eighteen minutes of deliberation, the jury found for Defendants. *Ekandari and State Farm Insurance Company v. Bell Trans Nevada Corporation and Borromeo*, April 20, 2017.

Plaintiff Found Comparatively At-Fault in Single-Vehicle Accident

A male, 64 year-old Plaintiff, allegedly lost control of his Ferrari and crashed due to sand and gravel present on the roadway around Defendant's gravel pit. The Ferrari was totaled. Plaintiff claimed that Defendant knew of the danger posed by sand and gravel on the roadway as Defendant had previously hired a street sweeper to clean the roadway. Defendant denied liability, maintaining that it was not responsible for cleaning the roadway and that Plaintiff lost control of his vehicle due to his own unsafe driving.

Plaintiff alleged dental injuries, injuries to his knees, lacerations to his head, face and arm, and residual scarring, and also sought $175,648.00 in property damage. Plaintiff made a pretrial offer of judgment in the amount of $129,000.00. Defendant made an offer of judgment in the amount of $25,001.00.

At trial, Plaintiff relied on an automotive appraiser, who valued Plaintiff's vehicle at $175,648.00. In contrast, Defendant's automotive appraiser valued Plaintiff's vehicle at $85,000.00. Defendant also called an accident reconstructionist, who opined that Plaintiff lost control of his vehicle because he was speeding.

Following a four-day trial and more than three hours of deliberation, the jury awarded Plaintiff $28,000.00 for loss of use and enjoyment and for pain and suffering, and $123,000.00 in property damage. The jury also found Plaintiff to be 30% at fault, thereby reducing Plaintiff's award to $105,700.00. *Armstrong v. Wells Cargo, Inc.*, June 16, 2017.

Repeat Motor Vehicle Accident Victim Compensated in Fender Bender

Plaintiff, a 50 year-old, female teacher, was rear-ended by Defendant, a 40 year-old male, while she was stopped at a red light. Defendant admitted negligence, but argued causation, specifically that Plaintiff had been involved in five prior collisions. Plaintiff alleged that, as a result of the collision, she sustained a cervical strain and sprain, which required continuous treatment for fourteen months. She also alleged that she experienced cervical pain and stiffness for four years following the collision.

This matter was tried on a one day short trial. At trial, Plaintiff relied on the medical records of a neurosurgeon, who recommended Plaintiff undergo an MRI, nerve condition testing, and physical therapy. Plaintiff also referenced the medical records of an additional physician who recommended spinal injections, which the Plaintiff declined.

Defendant argued that this was a low-impact collision, with no damage to the Defendant's vehicle, and only a small crack to the Plaintiff's bumper. Defendant maintained that Plaintiff was

not injured, and that her complaints were related to injuries sustained in prior motor vehicle collisions. Additionally, Defendant argued that Plaintiff had treated intermittently leaving gaps in treatment, never missed work, continued to go to the gym, and was able to take a vacation to Hawaii.

The parties stipulated to a four person jury panel. After the one-day trial, the jurors unanimously awarded Plaintiff $23,155.60 in compensatory damages. Post-trial, the Court awarded Plaintiff $4,500.00 in additur, $3,000.00 in attorneys' fees, $2,607.00 in costs, and $3,226.00 in interest. *Buttindaro v. Long*, April 14, 2017.

Medical Malpractice

Physician Not Liable for Plaintiff's Wrist Pain Following Carpal Tunnel Release Surgery

Plaintiff sought treatment from Defendant orthopod regarding numbness in both wrists. On December 7, 2012, Plaintiff underwent carpal tunnel release surgery on the right wrist at Defendant's surgical center with no issues. Two weeks later, Plaintiff underwent carpal tunnel release surgery on the left wrist. He subsequently experienced swelling and an electrical shock sensation that ran from his hand to his elbow and occasionally to his shoulder, which Defendant assured Plaintiff was not unusual. Two weeks later, Plaintiff returned to Defendant and Defendant again assured Plaintiff that his symptoms were normal and referred Plaintiff to an occupational therapist.

After two weeks of occupational therapy, Defendant performed a second surgical procedure on January 31, 2013 to determine the cause of Plaintiff's swelling and other issues. Plaintiff's complaints continued, and he began to experience numbness in his left thumb, index finger, and middle finger. On February 6, 2013, Defendant advised Plaintiff he had reflex sympathetic dystrophy and Plaintiff resumed occupational therapy. On June 19, 2013, Defendant advised Plaintiff he had reached a plateau and that Defendant could not offer any further treatment, and referred Plaintiff to a hand specialist. Plaintiff subsequently treated with another orthopod, his primary care physician, and a neurologist. The neurologist performed a nerve damage test on July 29, 2013 which confirmed Plaintiff's hand was permanently damaged. On September 24, 2013, Plaintiff underwent an MRI of his left wrist, which revealed that the median nerve had been split at the wrist and was permanently damaged.

Plaintiff alleged Defendant fell below the standard of care when he failed to perform a scope prior to carpal tunnel release surgery and failed to provide proper postoperative care and treatment, causing Plaintiff to sustain a significant permanent injury to his wrist.

At trial, Plaintiff relied upon the testimony of an orthopedic physician. Defendants denied falling below the standard of care, and relied upon the testimony of a pain management physician. Following an eight-day trial, the jury returned a verdict in favor of Defendants. *Whittacre v. Horizon Surgical Center, L.L.C.; and Tait, M.D.*, April 6, 2017.

Premises Liability

Nightclub Patron Succeeds in Claim for Assault and Battery, Intentional Infliction of Emotional Distress, and False Imprisonment

Plaintiff, a male New York resident and businessman, was a V.I.P. guest at a casino nightclub. Plaintiff provided Defendants' cocktail waitress his credit card and identification, after which he and his friends socialized at a V.I.P. table and drank expensive champagne for approximately three hours. During this time, Defendants' cocktail waitress convinced Plaintiff to permit her to drink some of Plaintiff's champagne.

After several hours, during which time the waitress had consumed several glasses of champagne, Plaintiff requested the total bill. Defendants' cocktail waitress brought the bill, which totaled approximately $10,000.00. Plaintiff signed the bill, which was charged to his credit card, and the waitress returned the credit card and identification. As Plaintiff was leaving, he ordered an additional three drinks for his friends who remained at the V.I.P. table, and gave the waitress $300.00 in cash as payment and an additional gratuity.

Defendants' cocktail waitress was inebriated and allegedly became hostile and belligerent as Plaintiff was leaving the club, demanding that he give her his identification and credit card once again. Believing the waitress was attempting to perpetrate a fraud, Plaintiff stated he was leaving. At that point, two members of Defendants' security team, along with Defendants' manager, allegedly demanded Plaintiff's credit card and identification. Plaintiff explained that he had paid the bill in full and attempted to leave, but Defendants' security personnel and manager refused to allow Plaintiff to exit and physically forced Plaintiff through a door into a room between the nightclub and the swimming pool. At that point, Defendants' security personnel allegedly repeatedly assaulted and battered Plaintiff. Believing he would be killed, Plaintiff agreed to provide his identification and credit card, and was held against his will for an additional 15 to 20 minutes before being escorted out of the property.

Defendants denied liability, or in the alternative, argued Plaintiff was comparatively at fault. Plaintiff allegedly sustained a closed head injury, a concussion with residual traumatic brain damage, ongoing headaches, confusion, memory loss, difficulty concentrating, anxiety, and emotional trauma.

Plaintiff sought both compensatory and punitive damages, including medical damages and lost earnings. Following a 28-day trial and five hours of deliberation, the jury awarded Plaintiff $160,500,000.00 in compensatory damages, which included $23 million in past lost earnings, $79,500,000.00 future lost earnings, $20 million past

pain and suffering, and $38 million future pain and suffering. While the jury was deliberating the issue of punitive damages, the matter settled with a covenant not to disclose the terms of the settlement agreement. *Moradi v. Nevada Property 1, L.L.C., dba The Cosmopolitan of Las Vegas; and Roof Deck Entertainment, L.L.C., dba Marquee Nightclub*, April 28, 2017.

Casino Found Liable for Plaintiff's Trip and Fall Over Protruding Rebar in Parking Lot

Plaintiff, a 63 year-old real estate agent, alleged she tripped and fell over a piece of rebar protruding from the pavement in Defendant's parking lot, causing her to sustain a fracture in her right foot and a tibial tendon tear of the left ankle. Plaintiff sought $97,000.00 in medical expenses and $4,000.00 in lost wages.

Plaintiff made a pretrial settlement demand for $249,000.00 and Defendant offered $120,000.00. At trial, Plaintiff relied upon the testimony of her orthopedic treating physician, and requested the jury award $980,000.00. Defendant relied upon testimony from a retained orthopedic expert and suggested $25,000.00 was adequate compensation. Following a four-day trial and more than three hours of deliberation, the jury awarded Plaintiff $650,000.00 for past and future damages. *Castiglione v. NP Palace, L.L.C., dba Palace Station Hotel and Casino*, June 30, 2,017.

Breach Of Contract

Sellers Found to Have Breached Contract for Sale of Real Property

Plaintiffs entered into an agreement with Defendants to purchase Defendants' real property for $645,000.00, remitting $25,000.00 in earnest money. The Purchase Agreement provided that should the appraised value of the property be less than the agreed purchase price, the transaction would go forward if (1) Plaintiffs elected to pay the difference and purchase the property for the initial purchase price; or (2) Defendants elected to adjust the purchase price to equal the appraised value. If neither option was elected, the parties could renegotiate or cancel the agreement upon written notice and the earnest money would be returned to Plaintiffs.

The appraised value of the property was $642,000.00. Plaintiffs subsequently sent a counteroffer to Defendants requesting the purchase price be reduced to the appraised value, which Defendants did not accept. Two days later, Plaintiffs sent a second counteroffer to Defendants, again requesting the purchase price be reduced to the appraised value but also providing a deadline for Defendants' response. Defendants failed to respond by the deadline, but attempted to accept the counteroffer two days later. One week later, Plaintiffs sent correspondence to Defendants canceling the Purchase Agreement and demanding a return of the earnest money.

At the short trial, Plaintiffs alleged Defendants breached the contract and breached the covenant of good faith and fair dealing when they refused to return the earnest money deposit. Defendants denied liability. Four jurors deliberated and awarded Plaintiffs $25,000.00 compensatory damages. *Nakamura v. Vanbuskirk*, June 9, 2017.

Negligent Misrepresentation

Damages Awarded to Plaintiff Charged for Property Owners Association Fees Although He was not a Member of the Association

A retired male Plaintiff alleged that after he moved into his new home, Defendant, a property owners association, fraudulently advised Plaintiff that he owed monthly assessments to Defendant. Over the following ten years, Plaintiff remitted $21,363.00 in fees and assessments to Defendant. Plaintiff subsequently learned he was not a part of Defendant's association and received no benefit from Defendant. Plaintiff also alleged Defendant's access gate interfered with his easement.

Defendant denied liability on the grounds that Plaintiff received benefits from Defendant and the property development had always been administered as one homeowners association, even though Plaintiff did not live within Defendant's boundaries. Alternatively, Defendant argued Plaintiff voluntarily made the payments.

Plaintiff made a pretrial demand of $100,000.00 and Defendant offered $25,000.00. Following a nine-day trial and six hours of deliberation, the jury awarded Plaintiff $21,363.00, but found Plaintiff to be 30% at fault. Plaintiff's award was therefore reduced to $14,954.10. Plaintiff was, however, also awarded punitive damages in the amount of $20,000.00. *Freidrich v. Rancho Bel Air Property Owners Association Unit 2, Inc.*, June 29, 2017.

Comments

Nevada to Lose Two Supreme Court Justices in January 2019

On December 11, 2017, Chief Justice Michael Cherry and Justice Michael Douglas announced their plans to retire when their terms end in January 2019. Justice Douglas was appointed to the Court in 2004 and begins his term as chief justice January 2018. Chief Justice Cherry was first elected to the Court in 2006. Each recently made brief statements before hearing oral arguments in Las Vegas. Although the justices look forward to spending more time with their grandchildren, both will also continue hearing cases as senior judges after retirement.

Nevada Court of Appeals Chief Judge Abbi Silver announced she plans to run for the seat being vacated by Justice Douglas. Clark County District Court Judge Elissa Cadish announced plans to run for Chief Justice Cherry's seat.

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